No. 75-1443

In the Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
APR 9 1976
MICHAEL RODAK, JR., CLERK

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

MISTER SANDERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

MISTER SANDERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 522 F.2d 1167. The memorandum of the district court (App. C, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on September 12, 1975. A timely petition for rehearing was denied on December 12, 1975 (App. D, *infra*). On March 4, 1976, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a decision by the Secretary of Health, Education, and Welfare not to reopen a previously adjudicated claim for Social Security benefits is subject to judicial review under the Administrative Procedure Act.

This question has two components:

1. Whether Section 205(h) of the Social Security Act precludes judicial review of the Secretary's refusal to reopen prior final decisions denying claims for benefits under that Act.

2. Whether Section 10 of the Administrative Procedure Act grants subject-matter jurisdiction to the district courts to review agency action.

STATUTES AND REGULATIONS INVOLVED

Section 205 of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 405, Section 10 the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the regulations of the Department of Health, Education,

and Welfare, are set forth in pertinent part in Appendix E, *infra*.

STATEMENT

In 1964, respondent filed a claim for Social Security disability benefits.[1] Following an evidentiary hearing on the claim, the hearing examiner determined that respondent had not been disabled within the meaning of the Social Security Act on June 30, 1962, the date his insured status had expired (App. A, *infra*, p. 2a). On review, the Appeals Council sustained the decision of the hearing examiner. Respondent was notified of his right to seek judicial review of the final decision of the Secretary, but review was not sought (App. C, *infra*, p. 14a).

Almost seven years later, on March 15, 1973, respondent filed another application for disability benefits. After the claim was denied initially and upon

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[1] A claim for disability benefits is initiated by the filing of an application with the Social Security Administration. If the application is denied initially, the claimant is entitled, upon request, to reconsideration of the initial determination. 20 C.F.R. 404.910. If the claimant is still dissatisfied with the decision after reconsideration, he can obtain, upon request, an evidentiary hearing before an administrative law judge (originally, a hearing examiner). 20 C.F.R. 404.917. Further administrative review may be sought from the Appeals Council, which, in its discretion, may review the administrative law judge's decision. 20 C.F.R. 404.947. Following the action of the Appeals Council, a claimant may obtain judicial review in a civil action brought in the district court under 42 U.S.C. 405(g). At each stage of the administrative proceedings, a decision rendered on the claim becomes the final decision of the Secretary unless further review is timely sought. 20 C.F.R. 404.908, 404.916, 404.940, 404.951.

reconsideration, respondent requested a hearing (App. A, *infra*, p. 2a).

The administrative law judge, noting that respondent had not met the earnings requirement for insured status since the denial of his earlier claim, determined that the application was barred by the doctrine of *res judicata* and therefore dismissed the request for a hearing.[2] The administrative law judge further determined that, because more than four years had elapsed since respondent's earlier claim had been initially denied, the prior final decision on that claim could be reopened only to correct error on the face of the evidence on which the decision had been based.[3] The administrative law judge ruled that respondent had failed to show that there was such error and that, therefore, the prior final decision could not be reopened. The Appeals Council concluded that the action of the administrative law judge was correct (App. C, *infra*, p. 13a).

Respondent then filed this civil action in the United States District Court for the Northern District of Indiana, seeking review of the Secretary's refusal to reopen the prior final decision. The district court held that it was without jurisdiction to review the Secretary's refusal to reopen a prior final decision (App. C, *infra*, p. 14a).

The court of appeals, in 2-1 decision, reversed. The court agreed with the Secretary that jurisdiction to

[2] See 20 C.F.R. 404.937 (App. E, *infra*, pp. 20a-21a).

[3] See 20 C.F.R. 404.957 (App. E, *infra*, p. 21a).

review a refusal to reopen was not conferred by the Social Security Act (App. A, *infra*, p. 5a). But the court reasoned that jurisdiction generally was conferred by Section 10 of the Administrative Procedure Act, 5 U.S.C. 701 through 706, and determined that none of the exceptions of that Act apply here.

In particular, the court held that Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), does not "preclude judicial review" (5 U.S.C. 701(a)(1)) and that the Secretary's decision whether to reopen a prior final decision is not "committed to agency discretion by law" (5 U.S.C. 701(a)(2)). In so holding, however, the court acknowledged that "[t]he circuits are divided [both] on the question of whether section 10 of the Administrative Procedure Act * * * contains an independent grant of subject-matter jurisdiction * * * [and] on the question whether [Section 2]05(h) of the Social Security Act bars review under the APA" (App. A, *infra*, pp. 5a, 6a).

Judge Bauer dissented on the ground that "the simple language of the statute involved forbids judicial review of the decision of the Secretary not to reopen the determination" (App. A, *infra*, pp. 9a-10a).[4]

REASONS FOR GRANTING REVIEW

The courts of appeals are in conflict over whether Section 205(h) of the Social Security Act precludes judicial review of the Secretary's refusal to reopen

[4] The panel subsequently denied rehearing, and the full Seventh Circuit, with two judges dissenting, declined the suggestion for rehearing *en banc* (App. D, *infra*, pp. 15a-18a).

prior final decisions denying claims under that Act and also over whether Section 10 of the Administrative Procedure Act grants subject-matter jurisdiction to review agency action. Both issues are important and recurring.

The conflict over the interpretation of the Social Security Act has created substantial differences in the procedures available to social security claimants in different circuits. Moreover, if, as we contend, and as this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749, logically implies, that Act bars judicial review of the Secretary's refusal to reopen prior final decisions, the court below, and other courts in agreement with it, have imposed upon both the Secretary and the lower courts administrative, litigative, and adjudicative burdens significantly heavier than those contemplated by Congress.

The conflict over the interpretation of the Administrative Procedure Act has created substantial differences in the scope of jurisdiction exercised by the lower federal courts in different circuits. Because of the pervasive reach of the Administrative Procedure Act, which establishes standards for judicial review of "agency action," with specific exceptions, whether that Act independently confers subject-matter jurisdiction is a major unresolved question relating to the jurisdiction of the federal courts.

1. *Section 205(h) of the Social Security Act precludes judicial review of the Secretary's refusal to reopen prior final decisions denying claims for benefits under that Act.*

a. Section 205(g) of the Social Security Act permits a claimant to obtain review only of a "final decision of the Secretary made after a hearing." That provision does not allow review of decisions that may be made without a hearing. *Filice* v. *Celebrezze*, 319 F. 2d 443 (C.A. 9).[5] A petition to reopen a prior final decision may, as here, be denied without a hearing. Section 205(b) of the Act; see, *e.g.*, *Cappadora* v. *Celebrezze*, 356 F.2d 1, 4 (C.A. 2); *Ortego* v. *Weinberger*, 516 F.2d 1005, 1007 (C.A. 5); *Filice* v. *Celebrezze*, *supra*, 319 F.2d at 445-446. Thus the court of appeals correctly began its analysis by observing that the Social Security Act does not itself confer jurisdiction to review the Secretary's refusal to reopen a prior decision (App. A, *infra*, p. 5a). On this preliminary matter, the courts of appeals are in general agreement. See *Cappadora* v. *Celebrezze*, *supra*; *Davis* v. *Richardson*, 460 F. 2d 772 (C.A. 3); *Ortego* v. *Weinberger*, *supra*; *Hunt* v. *Weinberger*, 527 F. 2d 544 (C.A. 6); *Stuckey* v. *Weinberger*, 488 F. 2d 904 (C.A. 9) (*en banc*); *Hobby* v. *Hodges*, 215 F. 2d 754 (C.A. 10).

The courts of appeals part company, however, on the further question whether the Social Security Act comprehensively forbids review of such determinations of the Secretary. The Ninth Circuit, in *Stuckey* v. *Weinberger*, *supra*, held that Section 205(h) of

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[5] This result is not affected by this Court's holding in *Mathews* v. *Eldridge*, No. 74-204, decided February 24, 1976, that in some circumstances a claimant need not await a hearing to which he is entitled before bringing suit.

the Act precludes judicial review of the Secretary's determination not to reopen a prior final decision, at least where, as here, the prior decision was made after a hearing. Several other courts of appeals, including the court below in this case, have reached the opposite conclusion. See *Ruiz-Olan* v. *Secretary of Health, Education, and Welfare*, 511 F. 2d 1056 (C.A. 1); *Davis* v. *Richardson*, *supra*; *Lejeune* v. *Mathews*, 526 F. 2d 950 (C.A. 5); *Wallace* v. *Weinberger*, 528 F. 2d 700 (C.A. 6). Cf. *Cappadora* v. *Celebrezze*, *supra*.

Section 205(h) does preclude review. As this Court pointed out in *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757, the *second* sentence of that provision [6] bars the district courts from reviewing decisions of the Secretary, "save as provided [by Section 205(g) of] the Act." Since, as the court of appeals acknowledged, review here was not available under Section 205(g) (see pp. 4 and 7, *supra*), it was not available at all.

The court of appeals ignored the second sentence of Section 205(h), however, reading the jurisdictional holding in *Salfi* as limited to the proposition that the *third* sentence of that provision [7] bars only

[6] The second sentence of Section 205(h) provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided."

[7] The third sentence of Section 205(h) provides that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 41 of the Judicial Code of the United States to recover on any claim arising under this subchapter."

actions brought under 28 U.S.C. 1331 (App. A, *infra*, pp. 8a-9a). In fact, jurisdiction in *Salfi*, as here, had been alleged under, *inter alia*, the Administrative Procedure Act (see p. 7 of the *Salfi* Appendix), and this Court, in dismissing the claims of the unnamed class members, ruled that "sources of jurisdiction [other than Section 205(g) are] foreclosed by [Section 2]05(h)." 422 U.S. at 764. Accordingly, as we demonstrate at greater length at pp. 13-18 of our brief in *Norton* v. *Mathews*, No. 74-6212, argued January 13, 1976,[8] the third sentence of Section 205(h) bars the district courts from asserting jurisdiction over Social Security cases under either the mandamus statute, 28 U.S.C. 1361, or the Administrative Procedure Act.

In short, Section 205(h) doubly "preclude[s] judicial review" (5 U.S.C. 701(a)(1)): the third sentence of Section 205(h), which the court of appeals misconstrued, bars review of Social Security cases under the Administrative Procedure Act, and the second sentence of the statute, which the court disregarded, bars judicial review of reopening decisions altogether.

b. The decision below frustrates the policy of administrative finality that underlies the congressional determination to bar review of refusals to reopen prior final decisions. If such refusals are made subject to judicial review, "[p]ersistent claimants could relitigate claims numerous times in hopes of securing a favorable decision, at great cost to both the [Social

[8] We are furnishing a copy of our brief in *Norton* to respondent's counsel.

Security Administration] and the courts." *Stuckey* v. *Weinberger*, *supra*, 488 F. 2d at 910.

The volume of potential relitigation is substantial. The Secretary estimates that in calendar year 1975 approximately 2,400 requests for hearings were denied on the ground of *res judicata*; in the brief period of time since the decision in this case was handed down, at least three more courts of appeals have been required to adjudicate cases arising from refusals to reopen in such situations. See *Coulter* v. *Weinberger*, 527 F. 2d 224 (C.A. 3); *Lejeune* v. *Mathews*, *supra*; *Hunt* v. *Weinberger*, *supra*. Unless the decision below is reversed, cases like these can be expected to place a continuing and growing burden on the Secretary and the courts, a burden Congress never intended to impose.

2. *Section 10 of the Administrative Procedure Act does not grant subject-matter jurisdiction to the district courts to review agency action.*

Congress should not be presumed to have conferred subject-matter jurisdiction on the district courts, in a statute not otherwise dealing with jurisdictional matters, unless the statutory language, or at a minimum the legislative history, expresses a clear intention to grant jurisdiction. Cf. *Romero* v. *International Terminal Co.*, 358 U.S. 354, 379. Section 10 of the Administrative Procedure Act establishes the procedures and manner of judicial review of agency action, but it does not purport by its terms to enlarge the jurisdiction of the district courts. To the contrary, "where the statutory method of review is either absent or inadequate, the only remedy of an aggrieved party [under Section 10] is 'any applicable form of legal action * * * in any court of competent jurisdiction.'" *Local 542, International Union of Operating Engineers* v. *National Labor Relations Board*, 328 F. 2d 850, 854 (C.A. 3), certiorari denied, 379 U.S. 826.

The legislative history of the provision is similarly devoid of any evidence of a congressional intent to confer additional jurisdiction on the district courts. The Department of Justice played an active role in the drafting of the Administrative Procedure Act,[9] and the Attorney General advised Congress that Section 10 simply "declares the existing law concerning judicial review." Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., p. 229 (1946). This construction apparently was not challenged during congressional consideration of the bill.

Accordingly, the court of appeals erred in holding that Section 10 grants jurisdiction to review agency action. See, *e.g.*, Note, *The Jurisdictional Basis of Nonstatutory Judicial Review in Suits Against Federal Officers—Jurisdictional Amount, The Administrative Procedure Act and Mandamus*, 51 Wash. L. Rev. 97, 108-115 (1975). But the courts of appeals are sharply divided on this question.

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[9] See *Attorney General's Manual on the Administrative Procedure Act* 5-6, 8 (1947).

In addition to the court below, the First,[10] Fourth,[11] Fifth,[12] Tenth,[13] and District of Columbia Circuits [14] have held that jurisdiction is conferred by the Administrative Procedure Act, while the Third,[15] Sixth,[16] Eighth,[17] and Ninth Circuits [18] have held that it is not.[19] The time is ripe for resolution of this long-standing conflict on a fundamental issue of federal jurisdiction.

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[10] *Elton Orchards, Inc.* v. *Brennan*, 508 F. 2d 493 (C.A. 1).

[11] *McEachern* v. *United States*, 321 F. 2d 31 (C.A. 4).

[12] *Ortego* v. *Weinberger*, *supra*.

[13] *Bard* v. *Seamans*, 507 F. 2d 765 (C.A. 10).

[14] *Pickus* v. *United States Board of Parole*, 507 F. 2d 1107 (C.A.D.C.).

[15] *Grant* v. *Hogan*, 505 F. 2d 1220 (C.A. 3).

[16] *Bramblett* v. *Desobry*, 490 F. 2d 405 (C.A. 6), certiorari denied, 419 U.S. 872. But see *Hunt* v. *Weinberger*, *supra*.

[17] *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F. 2d 529 (C.A. 8).

[18] *Nguyen da Yen* v. *Kissinger*, Nos. 75-2493 and 75-2632, decided November 5, 1975 (C.A. 9).

[19] The Second Circuit considers the question open. *Aguayo* v. *Richardson*, 473 F. 2d 1090, 1101-1102 (C.A. 2), certiorari denied, 414 U.S. 1146.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1976.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT

v.

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division—No. H 74 C 146
ALLEN SHARP, *Judge*

Argued May 28, 1975 Decided September 12, 1975

Before TUTTLE,* TONE and BAUER, *Circuit Judges.*

TUTTLE, *Circuit Judge.* Mister Sanders appeals the order of the district court dismissing his complaint challenging the refusal of the Secretary of Health, Education and Welfare to reopen or recon-

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* Honorable Elbert P. Tuttle, United States Circuit Judge, Fifth Circuit, sitting by designation.

sider a 1966 disallowance of his claim for Social Security benefits. The sole question which we consider on appeal is whether the district court had jurisdiction to review the Secretary's decision. We conclude that there was jurisdiction, and accordingly we reverse.

The plaintiff applied in 1964 for Social Security disability benefits claiming that he was disabled due to a mental impairment, and that this disability arose prior to the expiration of his insured status under the Act, 42 U.S.C. §§ 416(i), 423. This claim was denied.[1] A final agency order was entered. Judicial review of this order was not sought. The plaintiff made his second application in 1973, almost seven years after final agency action on his earlier application. This application was denied on the grounds of the prior determinations' effect, *res judicata*, and the plaintiff's request for an administrative hearing and administrative review of this denial were similarly denied on the grounds of *res judicata*. Section 405(h) of the Act provides:

> "The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided."

[1] We will not discuss the merits of the plaintiff's claim. As the Secretary failed to file a certified copy of the administrative record in the case below, the plaintiff has not had the opportunity fully to develop his case as to whether there was error on the face of the record. Counsel for plaintiff at oral argument, in response to our questions, stated several possible errors, and it is enough for the purposes of this appeal that the plaintiff's claim of error on the face of the record is not clearly without merit.

Under the Act, a claimant may seek judicial review of a final agency order denying disability benefits if the request for review is filed within sixty days. 42 U.S.C. § 405(g). Such review is limited to a determination whether there was substantial evidence to support the agency findings.[2]

Pursuant to his statutory authority, the Secretary has promulgated regulations which define the circumstances under which decisions become final and under which final decisions may be reopened.[3] 20 C.F.R. § 404.937 provides that the agency may dismiss a request for a hearing on the grounds of *res judicata*:

> "(a) *Res judicata.* Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial affirmance or, without judicial consideration, upon the claim-

[2] Section 405(g) provides in relevant part: "The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . ."

[3] Section 405(a) gives the Secretary "full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of [Title II], which are necessary or appropriate to carry out such provisions."

> ant's failure timely to request reconsideration hearing, or review or to commence a civil action with respect to such determination or decision."

The regulations also provide that a final adverse decision may be reopened within 12 months, and may be reopened after 12 months but within four years of the initial determination, upon a showing of "good cause" [4] which is defined in 20 C.F.R. §§ 404.958(a) and 404.957(c)(8). "Good cause" includes a showing of new and material facts, or "for the purpose of correcting clerical error or error on the face of the evidence on which [the] determination or decision was based."

Because the plaintiff failed to request that his application's denial be reopened within four years, the administrative law judge held that the Secretary's earlier adverse decision could only be reopened pursuant to 20 C.F.R. § 404.957(c) (8) for error on the face of the evidence, and that no such error on the face of the evidence had been shown.[5]

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[4] 20 C.F.R. § 404.957(a) provides simply that an adverse determination may be reopened within 12 months of the initial determination; 20 C.F.R. § 404.957(b) provides for the longer four year period upon a showing of "good cause."

[5] This regulatory maze has been aptly described as "a model of what regulations addressed mostly to laymen—or even to lawyers—ought not to be." Cappadora v. Celebrezze, 356 F.2d 1, 3 n.1 (2d Cir. 1966). 20 C.F.R. § 404.957(c)(8) permits reopening an adverse decision "[a]t any time" but only when "[s]uch . . . decision is unfavorable . . . to the party thereto but only for the purpose of correcting . . . error on the face of the evidence on which such . . . decision was based."

As we have noted, until shortly before oral argument in this case counsel for the plaintiff did not have a copy of the administrative record in the earlier adverse determination and was thus understandably limited in his ability to make a showing of error "on the face of the evidence." The question before us is whether the decision of the agency not to reopen the prior determination is reviewable for an abuse of discretion.

It seems quite clear that the Act itself does not expressly authorize such review. Section 405(h), the Secretary argues, precludes judicial review save as it is expressly authorized by the Act itself. Thus, the Secretary argues, the review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, are inapplicable. We disagree.

The circuits are divided on the question of whether section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, contains an independent grant of subject-matter jurisdiction, without regard to the amount in controversy. We choose to follow those circuits which hold that it does. See *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974); *Bradley* v. *Weinberger*, 483 F.2d 410 (1st Cir. 1973); *Brennan* v. *Udall*, 379 F.2d 803 (10th Cir. 1967); *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961); *cf. Brandt* v. *Hickel*, 427 F.2d 53, 55 n. 2 (9th Cir. 1970). See also Davis, *Administrative Law Treatise* § 23.02 (Supp. 1970).[6]

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[6] Contra: *Bramblett* v. *Desobry*, 490 F.2d 405 (6th Cir. 1974), *cert. denied*, 419 U.S. 872 (1974); *Zimmerman* v.

In particular, the Act authorizes judicial review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, except:

> "to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

The circuits are likewise split on the question whether § 405(h) of the Social Security Act bars review under the APA. In our view the leading case of *Cappadora* v. *Celebrezze*, 356 F.2d 1 (2d Cir. 1966), was correctly decided, and in so holding we join the First, Third and Sixth Circuits. *Enrique Ruiz-Olan* v. *Secre-*

United States Government, 422 F.2d 326 (3d Cir. 1970), *cert. denied*, 399 U.S. 911 (1970); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967), but see *State Highway Commission of Missouri* v. *Volpe*, 479 F.2d 1099 (8th Cir. 1973). Rulings on the Second Circuit are inconclusive on the question. *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F.2d 912, 914 (2d Cir. 1960), *cert. denied*, 364 U.S. 894 (1960), holds that section 10 of the Administrative Procedure Act does not independently confer federal jurisdiction. *Cappadora* v. *Celebrezze*, 356 F.2d 1, 5-6 (2d Cir. 1966), however, discussed in the text, *infra*, assumes that it does. See *Toilet Goods Ass'n* v. *Gardner*, 360 F.2d 677, 679 n. 1 (2d Cir. 1967), *aff'd*, 387 U.S. 158 (1967). But compare *Wolff* v. *Selective Service Board*, 372 F.2d 817, 826 (2d Cir. 1967). And see *Mills* v. *Richardson*, 464 F.2d 995, 1001 n. 9 (2d Cir. 1972), stating that the question had not yet been determined in the Second Circuit. This confusion is recognized in *Aguayo* v. *Richardson*, 473 F.2d 1090, 1101-1102 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). As Judge Friendly observed in the latter opinion, judicial and academic writers differ on whether the Supreme Court has taken a position on this question in *Rusk* v. *Cort*, 369 U.S. 367 (1962), and *Flast* v. *Cohen*, 392 U.S. 83 (1968).

tary of HEW, 511 F.2d 1056 (1st Cir. 1975); *Davis* v. *Richardson*, 460 F.2d 772 (3d Cir. 1972); *Maddox* v. *Richardson*, 464 F.2d 617 (6th Cir. 1972).[7]

Since *Cappadora* was decided in 1966 there has been an enormous expansion in the case law construing the non-reviewability provisions of the APA. The Supreme Court has held that there is virtually a presumption of judicial review of administrative action. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967), unless a contrary purpose is fairly discernible in the statutory scheme, *Data Processing Service* v. *Camp*, 397 U.S. 150, 157 (1970). Agency action is normally found to be non-reviewable "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 141. Clearly the absence of statutory language expressly authorizing judicial review is insufficient to offset the presumption that administrative action is reviewable. "Indeed, judicial review of such administrative action is the rule, and non-reviewability an exception which must be demonstrated." *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970).

---

[7] The Ninth and Tenth Circuits have held the contrary, that review is precluded by 42 U.S.C. § 405(h). *Stuckey* v. *Weinberger*, 488 F.2d 904 (9th Cir. 1973); *Wallace* v. *Weinberger*, 488 F.2d 606 (9th Cir. 1973) *cert. denied*, 417 U.S. 91[illegible] (1974); *Neighbors* v. *Secretary of HEW*, —— F.2d —— (10th Cir., August 5, 1974). We note that the Ninth Circuit's *en banc* consideration of the question resulted in a sharply divided court.

Without the benefit of this guidance from the Supreme Court, the Second Circuit found that the language of § 405(h) did not expressly preclude judicial review of the Secretary's refusal to reopen a determination:

> "[We] do not believe that Congress would have wished to close the doors of the courts to a plaintiff whose claim for social security benefits was denied because of an unreasonable or inappropriate agency rule on reopening or because of a truly arbitrary administrative decision.... Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual." *Cappadora, supra*, 356 F.2d at 6.

Following submission and oral argument the Supreme Court has decided *Weinberger* v. *Salfi*, 95 S.Ct. 2457 (1975). The government, by supplemental brief, contends that this decision establishes the proposition that there can be no review in this case. We conclude that it does not. What, and all that, was before the Court in *Salfi* was whether a denial of benefits could be reviewed by a court proceeding under 28 U.S.C. § 1331. The Court held that the specific terms of § 405 (h), "[n]o action against the United States, (or) the Secretary . . . shall be brought under [§§ 1331 *et seq.*] of Title 28 to recover on any claim . . ." barred suit under § 1331. The Court did not consider the review provisions of the Administrative Procedure Act, however, as it found that review was

proper under § 405(g) of the Act. The decision is thus inapposite to the case before us.

In our view the *Cappadora* court correctly construed the § 405(h) language forbidding review "except as herein provided" to apply only to judicial review of final administrative orders on the merits of a claim:

> "Although it could be argued that the second sentence of § 405(h) of the Social Security Act is a statutory preclusion of such review [of a decision not to reopen what had become a final determination], the more reasonable construction is that this simply forbids attempts to review final decisions on the merits by any route other than that provided in § 405(g)." 356 F. 2d at 5. .

We further agree with *Cappadora* that the decision to reopen a determination has not been left to the unreviewable discretion of the agency. Accordingly the district court possessed jurisdiction under the Administrative Procedure Act to review the Secretary's refusal to reopen the plaintiff's adverse determination. We remand for consideration by the district court as to whether the Secretary abused his discretion in failing to reopen the determination.

Reversed and Remanded for further proceedings not inconsistent with this opinion.

BAUER, *Circuit Judge*, dissenting. I feel compelled to dissent. It seems to me the simple language of the

statute involved forbids judicial review of the decision of the Secretary not to reopen the determination. I would, therefore, affirm.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

OPINION BY JUDGE TUTTLE

(JUDGE BAUER DISSENTS)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

SEPTEMBER 12, 1975

Before

HON. ELBERT P. TUTTLE, Circuit Judge *
HON. PHILIP W. TONE, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge

No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT

vs.

CASPAR WEINBERGER, ETC., DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division—No. H 74 C 146
ALLEN SHARP, *Judge*

* Honorable Elbert P. Tuttle, United States District Judge, Fifth Circuit, sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED and REMANDED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil No. H 74-146

[Filed Nov. 15, 1974]

MISTER SANDERS

v.

CASPAR WEINBERGER, Secretary of Dept. of Health, Education and Welfare

ORDER

The Defendant's MOTION TO DISMISS is GRANTED. The cause is ordered dismissed as this court is without jurisdiction over the subject matter of this suit.
ENTER: November 15, 1974

/s/ Allen Sharp
Judge, U. S. District Court

MEMORANDUM

This cause was filed after an order of the Appeals Council affirming the dismissal of plaintiff's action by the Administrative Law Judge. That determination was based upon the doctrine of res judicata—stating

that the prior determination dated February 24, 1966 stands as the final determination of the Department. Plaintiff filed no civil action subsequent to the 1966 dismissal.

Plaintiff relies upon the case of *Ortiz v. Secretary of H.E.W.* to uphold his position that the affidavit and supporting documents attached to the Motion to Dismiss are insufficient to sustain the res judicata defense. *Ortiz, Id.*, 355 F.Supp. 318, (D.C. P.R. 1973). The court in Ortiz denied the motion to dismiss because there was no showing that the hearing examiner included findings that the case had been considered for possible reopening pursuant to 20 CFR 404.957 when the examiner dismissed the Ortiz case under 20 CFR 404.937(a). That is not the situation in the instant case. In Exhibit 1 attached to the memorandum, the Administrative Law Judge, on January 15, 1973, specifically included the issue of possible reopening before dismissing the action because it was res judicata.

There is no compelling reason for the court to order a complete transcript as requested by the plaintiff when the item lacking in the *Ortiz* case is specifically referred to in the Order of Dismissal of January 15, 1973.

Therefore, this court is without jurisdiction to consider the subject matter of this suit and the dismissal is ordered to be entered accordingly.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

DECEMBER 12, 1975

Before

HON. ELBERT P. TUTTLE, Senior Circuit Judge *
HON. PHILIP W. TONE, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge

No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT

vs.

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division—No. H 74 C 146

ALLEN SHARP, *Judge*

---

* Senior Circuit Judge Elbert P. Tuttle of the United States Court of Appeals for the Fifth Circuit is sitting by designation.

ORDER

On consideration of the petition for rehearing of the defendant-appellee and the majority of the panel having voted to deny the petition for rehearing,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

Judge Bauer would grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

DECEMBER 12, 1975

Before

HON. THOMAS E. FAIRCHILD, Chief Judge
HON. LUTHER M. SWYGERT, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. WILBUR F. PELL, JR., Circuit Judge
HON. JOHN PAUL STEVENS, Circuit Judge
HON. ROBERT A. SPRECHER, Circuit Judge
HON. PHILIP W. TONE, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge

No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT

vs.

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division—No. H 74 C 146

ALLEN SHARP, *Judge*

ORDER

On consideration of the suggestion for rehearing *en banc* filed in the above-entitled cause, a vote on the suggestion having been called for, and a majority of the active members of the court having voted to deny a rehearing *en banc*,

IT IS ORDERED that the suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

Judges Pell and Bauer would rehear the appeal *en banc*.

APPENDIX E

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * *

2. Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

3. The Administrative Procedure Act, 5 U.S.C. 701(a), provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

4. The Administrative Procedure Act, 5 U.S.C. 703, provides:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5. The Administrative Procedure Act, 5 U.S.C. 704, provides in part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. * * *

6. 20 C.F.R. 404.937 provides in part:

> The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> (a) *Res judicata.* Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claim-

> ant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision * * *.

7. 20 C.F.R. 404.957 provides in part:

> An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final * * * may be reopened:
>
> (a) Within 12 months from the date of the notice of the initial determination * * * to the party to such determination, or
>
> (b) After such 12-month period, but within 4 years after the date of the notice of the initial determination * * * to the party to such determination, upon a finding of good cause for reopening such determination or decision, or
>
> (c) At any time when:
>
> * * * *
>
> (8) Such * * * determination or decision * * * is unfavorable * * * to the party thereto but only for the purpose of correcting clerical error or error on the face of the evidence on which such determination or decision was based.
>
> * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 204244 234

Supreme Court, U. S.
FILED
SEP 3 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1443

F. DAVID M[illegible]EWS, PETITIONER

—v.—

MISTER SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 9, 1976
CERTIORARI GRANTED JUNE 1, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1443

F. DAVID MATHEWS, PETITIONER

—v.—

MISTER SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/22/74	Complaint filed. . . .
9/26/74	Govt. files Motion to Dismiss Pltf's. Complaint, with Brief in Support and cer. of ser. thereon.
11/13/74	Pltf. files Reply Brief to Defendant's Brief in Support of Motion to dismiss Plaintiff's Complaint with proof of service thereon.
11/15/74	Order Entered: The deft's. Motion to Dismiss is Granted. This cause is ordered dismissed as this court is without jurisdiciton over the subject matter of this suit. (SE) Sharp, Judge. Copies to counsel.
12/13/74	Deft. Mister Sanders files Notice of Appeal of order of court to dismiss this cause for the reason that the court is without jurisdiction over the subject matter of this suit.
12/13/74	Clerk's Certificate prepared. Copies to counsel and Ct. of Appeals.
12/13/74	Pltf. files Bond for Costs.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No. H-74-146

MISTER SANDERS, PLAINTIFF

vs.

CASPER WEINBERGER, United States Secretary of Health, Education and Welfare, DEFENDANT

COMPLIANT FOR REVIEW OF DECISION OF SECRETARY OF HEALTH, EDUCATION AND WELFARE

Plaintiff complains of defendant and says:

1. That plaintiff is and has been a resident of East Chicago, Lake County, Indiana, within the District and Division of this Court continuously since a time prior to June 30, 1962. Plaintiff presently resides at 609 East 150th Street, East Chicago, Indiana.

2. This Court has jurisdiction to hear and determine this complaint pursuant to the laws of the United States as set forth in 42 U.S.C. Section 405(g).

3. This action is an appeal from the decision of the Appeals Council, Department of Health, Education and Welfare, Social Security Administration.

4. This action is commenced within sixty days of the decision of said Appeals Council, said decision being dated April 5, 1974.

5. That said decision of the Appeals Council constitutes the final decision of the Social Security Administration and the Secretary of Health, Education and Welfare and all administrative remedies have been exhausted.

6. That the findings of the Appeals Council are not based upon substantial evidence and are contrary to fact and law.

7. That the record of the administrative law judge will disclose error on the face of the evidence upon which his decision was based.

8. That a copy of the decision of the administrative law judge is attached hereto, made a part hereof and marked Exhibit "A"; that a copy of the decision of the Appeals Council is attached hereto, made a part hereof and marked Exhibit "B".

9. That the undersigned has been the attorney for plaintiff since the date of the decision of the administrative law judge on January 15, 1974, and the undersigned is entitled to reasonable fees for his services herein.

10. That the date of Exhibit "A", January 15, 1973, is in error, the correct date being January 15, 1974.

WHEREFORE, plaintiff prays the Court to review the decision of defendant, to enter an order consistent with the Court's findings, to award appropriate attorney fees and for all other proper relief.

KOWALSKI, KANZ AND O'DROBINAK

By /s/ William A. Kowalski
WILLIAM A. KOWALSKI
Attorneys for the Plaintiff
723 W. Chicago Avenue
East Chicago, Indiana 46312
(219) 397-7233

EXHIBIT A

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

ORDER OF DISMISSAL

In the case of

Mister Sanders
(Claimant)

(Wage Earner) (Leave blank if same as above)

Claim for

Period of Disability and
Disability Insurance Benefits

260-36-4656
(Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

This case is before the undersigned Administrative Law Judge upon a request for hearing filed on October 3, 1973 by the claimant, Mister Sanders, who disagrees with the determination of the Bureau of Disability Insurance, Social Security Administration, that he is not entitled to a period of disability and disability insurance benefits under the Social Security Act.

The claimant filed a prior application for a period of disability and disability insurance benefits on January 30, 1964. The claimant complained of various impairments in that first application that included epilepsy and "blackout spells" which he alleges caused him to be unable to work for about 4½ years prior to his application

of January 30, 1964. On June 2, 1965, the claimant was notified by the Bureau of Disability Insurance Benefits, Social Security Administration that his application was denied. He requested reconsideration of this denial and was subsequently notified by a letter dated October 29, 1965 that the original denial had been affirmed. Thereafter, the claimant still being dissatisfied filed a request for hearing and a hearing was held on December 21, 1965. The Hearing Examiner (now called Administrative Law Judge) affirmed the Administration on February 24, 1966 and determined that the claimant was not entitled to disability insurance benefits or to a period of disability. The Appeals Council by a letter dated June 13, 1966 notified the claimant that the decision of the Administrative Law Judge was the final decision of the Secretary of Health, Education and Welfare and advised the claimant that he had the right to commence a civil action in the United States District Court within sixty days to review the decision of the Administrative Law Judge. The claimant did not file a civil action for review in the United States District Court. The claimant filed a second application to establish a period of disability and for disability insurance benefits on March 5, 1973, wherein he again alleged epilepsy and "blackout spells." On May 25, 1973, the claimant was notified by the Bureau of Disability Insurance, Social Security Administration, that his application was denied. He requested reconsideration of this denial and was subsequently notified by letter dated September 28, 1973. that the original denial had been affirmed. Thereafter the claimant still being dissatisfied, filed a request for hearing on October 3, 1973. Since the decision of the Administrative Law Judge on February 24, 1966, the claimant submitted additional medical evidence that indicates that the claimant has complained of epilepsy and "blackout spells" since 1964.

ISSUES AND APPLICABLE LAW

The general issue before the Administrative Law Judge is whether the claimant is entitled to a period of dis-

ability and to disability insurance benefits under the Act. The specific issue is whether the claimant is entitled to have his prior application reopened since more than four years have elapsed since the decision of the Administrative Law Judge on February 24, 1966 and the claimant last met the earnings requirements of the Social Security Act on June 30, 1962.

20 CFR 404.937 provides:

> "The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> (a) Res judicata. Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision . . ."

20 CFR 404.951 provides:

The Appeals Council may deny a party's request for review or it may grant review and either affirm or reverse the Administrative Law Judge's decision. The decision of the Appeals Council, or the decision of the Administrative Law Judge where the request for review is denied (see 404.947), shall be final and binding upon all parties to the hearing unless a civil action is filed in the district court of the United States under the provisions of section 205(g) or section 1869(b) of the Act, or unless the decision is revised under the provisions described in § 404.956.

20 CFR 404.957 provides in pertinent part:

> . . . a decision of a hearing examiner (Administrative Law Judge) which is otherwise final . . . § 404.951 may be reopened:
>
> • • • •
>
> (c) at any time when
>
> • • • •
>
> (8) such . . . decision . . . is unfavorable, in whole or in part, to the party thereto but only for the purpose of correcting . . . error on the face of the evidence on which such . . . decision was based.

RATIONALE

The Appeals Council on June 13, 1966 specifically advised the claimant that the decision of the Administrative Law Judge was the final decision of the Secretary of Health, Education and Welfare and that the claimant had the right to request a review in the United States District Court within sixty days of that final decision pursuant to section 205(g) of the Social Security Act (42 U.S.C. § 405(g)). The claimant did not file for a review in the United States District Court and the decision of the Administrative Law Judge became final and binding upon the claimant. Since more than four years have elapsed since the decision became final it can only be reopened under the provisions of 20 CFR 404.957 (c)(1) through (9). The only possible applicable section is 20 CFR 404.957(c)(8). I find that there is no error on the face of the evidence on which the decision of February 24, 1966 was made.

In order for the claimant to be entitled to a period of disability or to disability insurance benefits, it was necessary for him to establish that he was under a "disability" commencing on or prior to June 30, 1962 when he last met the earnings requirements of the Act. Since the claimant's special earnings requirement expired on June 30, 1962, there is no unadjudicated period subsequent to the final decision of the Secretary on February 24, 1966. The parties and the issues are the same in the both applications and the additional medical evi-

dence is merely repititions and cumulative. The allegations of the claimant and the additional evidence submitted do not warrant a change in the conclusion reached in the prior decision. Any further adjudication of these identical matters is barred under the doctrine of *res judicata*.

It is well settled that a claimant may not, by filing repeated applications obtain repeated determinations or decisions with respect to the same issues or renew rights which he allowed to lapse by his failure to seek administrative or judicial review within the statutory period for

EXHIBIT B

[SEAL]

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518, Washington, D.C. 20018

5 APR 1974

REFER TO IRA-2
260-36-4656

BUREAU OF
HEARINGS AND APPEALS

ACTION OF APPEALS COUNCIL ON REQUEST
FOR REVIEW OF
ADMINISTRATIVE LAW JUDGE'S DISMISSAL

Mr. Mister Sanders
609 East 150th Street
East Chicago, Indiana 46312

Dear Mr. Sanders:

Your request for review of the administrative law judge's dismissal has been carefully considered by the Appeals Council. The Council's consideration of your case included the law and regulations applicable to your claim, the action taken by the administrative law judge and your reasons for believing that your request for hearing should not have been dismissed.

The Appeals Council has concluded that the dismissal action of the administrative law judge is correct. Ac-

cordingly, the determination dated February 24, 1966, stands as the final determination of this Department.

Sincerely yours,

/s/ [Illegible]
Acting Member,
Appeals Council

cc:

Mr. William A. Kowalski
Attorney at Law
East Chicago, Indiana 46312

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Hammond Civil No. H 74-146

MISTER SANDERS, PLAINTIFF,

vs.

CASPAR WEINBERGER, Secretary of the United States Department of Health, Education and Welfare,
DEFENDANT.

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Comes now the Defendant, Caspar Weinberger, Secretary of the Department of Health, Education and Welfare by his attorney, John R. Wilks, United States Attorney for the Northern District of Indiana, and moves the Court to dismiss the Complaint herein on the grounds that it fails to state a cause of action upon which relief may be granted and that this Court is without jurisdiction over the subject matter herein, as further appears from the exhibits and memorandum of law filed herewith.

Respectfully submitted,

JOHN R. WILKS
United States Attorney

By: /s/ Richard A. Hanning
RICHARD A. HANNING
Assistant United States Attorney

Office of the United States Attorney
Federal Building, Room 312
507 State Street
Hammond, Indiana 46320

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil Action No. H 74-146

MISTER SANDERS, PLAINTIFF

vs.

CASPER WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT

AFFIDAVIT OF H. DALE COOK

COUNTY OF ARLINGTON)
) ss
STATE OF VIRGINIA)

I, H. DALE COOK, being first duly sworn, depose and say as follows:

(1) I am Chairman of the Appeals Council and Director of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare. The Bureau of Hearings and Appeals includes, besides the Appeals Council itself, administrative law judges, formerly called "hearing examiners," who hold hearings on claims arising under title II of the Social Security Act, as amended, when such hearing is duly requested by a claimant who is dissatisfied with the administrative determination of his claim.

(2) One of the functions of the Appeals Council is to pass upon requests for review of hearing decisions rendered by the administrative law judges and to either grant, deny or dismiss any such request. Under the regulations and practice of the Social Security Administration, if the Appeals Council denies a timely request for review of a hearing decision, that decision thereupon becomes the "final decision" within the meaning of, and subject to, the provisions for judicial review in section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. section 405(g), the first sentence of which reads as follows:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * *"

(3) It is provided in Social Security Administration Regulations No. 4, section 404.937 (20 CFR 404.937) that a request for a hearing may be dismissed, either entirely or as to any stated issue, on the basis of res judicata. Res judicata is defined in the same regulations, section 404.937(a) (20 CFR 404.937(a)) as follows:

> "Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision * * *."

Sections 404.937a and 404.937b of Regulations No. 4 (20 CFR 404.937a and 404.937b) direct that notice of any such dismissal and the right to request review thereof by the Appeals Council shall be given to a party, and that such dismissal shall be final and binding on the parties unless vacated.

(4) It is provided in Regulations No. 4, section 404.945 (20 CFR 404.945) that where a hearing decision has been made or a request for hearing dismissed, any party thereto may request the Appeals Council to review such decision or dismissal.

(5) I am responsible for the maintenance of Departmental files relating to functions performed by administrative law judges and the Appeals Council on claims arising under title II of the Social Security Act, as amended, including decisions and orders therein and correspondence in reference thereto. The official file main-

tained by the Bureau of Hearings and Appeals relating to the claim of the plaintiff, MISTER SANDERS, under title II of the Social Security Act, was examined under my supervision, and to the best of my knowledge and belief said file shows that:

(a) The plaintiff last met the special earnings requirements of the Act for disability purposes on June 30, 1962.

(b) On January 30, 1964, the plaintiff filed his first application for a period of disability and disability insurance benefits. This claim was denied initially and on reconsideration. On February 24, 1966 an administrative law judge issued a decision holding that the plaintiff was not entitled to disability insurance benefits or to a period of disability (Exhibit 1). The plaintiff thereafter requested the Appeals Council to review the decision of the administrative law judge, and on June 13, 1966 he was notified that his request for review was denied and that he had a right to commence a civil action in the United States District Court within sixty days to review the decision of the administrative law judge (Exhibit 2). The plaintiff did not file a civil action for review in the United States District Court.

(c) On March 15, 1973, the plaintiff filed a second application for a period of disability and disability benefits. This claim was denied initially and on reconsideration. Thereafter, on October 3, 1973, the plaintiff filed a request for hearing. On January 15, 1974, an administrative law judge issued an order dismissing the request for hearing on the grounds of res judicata (Exhibit 3). In his complaint, the plaintiff has made reference to the incorrect dates on the Notice of Dismissal and Order of Dismissal, which were dated January 15, 1973 instead of January 15, 1974. On March 5, 1974, the plaintiff requested the Appeals Council to review the action of the administrative law judge. By letter dated April 5, 1974, the plaintiff was advised of the Appeals Council's conclusion that the "dismissal action of the administrative law judge is correct" and that "the determination dated February 24, 1966, stands as the final determination of this Department" (Exhibit 4).

(6) On May 22, 1974, the plaintiff filed a civil action in the United States District Court for the Northern District of Indiana, Hammond Division.

/s/ H. Dale Cook
H. DALE COOK

Subscribed and sworn to before me this 5th day of September, 1974.

/s/ Marilynn H. Garrison

NOTARY PUBLIC, County of Arlington, State of Virginia. My Commission Expires November 28, 1976

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

NOTICE OF DECISION

PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision of the hearing examiner, you may request the Appeals Council to review it. However, your request for review must be filed *within 60 days* following the date shown below.

You, or your representative, may file the request for review at the nearest district office of the Social Security Administration, with the hearing examiner, or with the Appeals Council.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g) of the Social Security Act.

This notice and enclosed copy of Hearing Examiner's Decision mailed to the claimant on February 24, 1966.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

HEARING EXAMINER'S DECISION

In the case of

Mister Sanders
(Claimant)

Mister Sanders
(Wage Earner)

Claim for

Disability Insurance Benefits
260-36-4656
(Social Security Account Number)

This case is before the Hearing Examiner upon the request for hearing filed on November 16, 1965, by Mister Sanders, the claimant, who disagrees with the reconsideration determination of the Social Security Administraton, Department of Health, Education and Welfare, of which he was notified by letter dated October 29, 1965. After due notice a hearing was held before the undersigned Hearing Examiner on December 21, 1965, at Chicago, Illinois. The claimant was present and participated in the hearing.

The record shows that the earnings requirements for disability purposes were not in the alleged quarter of disability and continued to be met through the calendar quarter ending June 30, 1962.

STATEMENT OF CLAIMANT'S ALLEGATIONS AND TESTIMONY

The determination from which the claimant appeals is that denying his application for a period of disability and/or disability insurance benefits filed on January 30,

1964, under sections 216(i) and 223 of the Social Security Act, as amended (42 USC 416(i) and 423). It was determined that the claimant's impairments were not of sufficient severity as to preclude him from engaging in any substantial gainful activity from about 4½ years ago, the alleged date of onset of disability, and during the life of his application filed on January 30, 1964, or at any time prior to the expiration of the earnings requirements, whichever first occurred. In the request for hearing filed by the claimant he states: "I feel I am disabled. The doctor has not released me to return to work."

In his application the claimant stated that he was born on March 18, 1929; that he completed three grades in school; that he worked in the steel mill as a bricklayer's helper; and that he last was able to work in 1960. He described his impairment as mental condition, trouble with left abdomen.

In his testimony at the hearing the claimant stated that his correct date of birth is March 18, 1929. His formal schooling extended to the fifth grade.

His first employment was field work, including chopping and hoeing cotton, picking peas. He worked about five years at a service station pumping gas, fixing flat tires and washing cars. For a number of years he was a helper in construction work and then in a foundry. He was a mobile operator at a steel company. When the furnace was tapped, he pushed out the slag from underneath the oven hearth. The vehicle he drove had one pedal and two levers, one for the left and one for the right. His next employment until about eight years ago was as a mason helper, carrying mud and bricks in a wheelbarrow to the bricklayers. He was terminated because they said he was not doing his work.

In 1964 he felt pretty good and looked for a job. He worked three or four weeks breaking steel with a 12 pound hammer. He got weak and had to quit.

With respect to his health, claimant said he probably has been ill about eight years. He had headaches and saw Dr. Fleischer who gave him some medicine to take two

or three times a day. In 1960 or 1961 he was hospitalized for removal of hemorrhoids.

He changed to Dr. Broomes who gives him electric treatments for his neck and head. Claimant stated pains go down from his head to his neck and shoulders.

Claimant's stomach started giving him trouble about a year ago. He has a weak place on the left side; when he eats heavy food it gets full quicker than the other side. He receives liquid medicine for it from the Clinic Prescription Pharmacy.

Claimant also said that he used to have blackout spells but does not have them regularly as he used to. He has not had any in two or three months.

Lizzie Sanders, wife, testified that claimant used to have spells once a month when he would black out for a minute and a half. She would place a cloth on his head and he would come to. The spells don't come often now.

SUMMARY OF MEDICAL EVIDENCE

Medical evidence in the record was submitted by St. Catherine Hospital, Dr. Jacob C. Fleischer, Dr. Edward L.C. Broomes, Dr. Byron Kilgore and Dr. Peter V. Westhaysen.

St. Catherine Hospital noted claimant's admission from January 14, 1960, to January 20, 1960 for surgical treatment of internal and external hemorrhoids.

Dr. J. C. Fleischer reported whip lash injury to claimant's cervical spine in September 1961. On January 13, 1965, the diagnosis was neurasthenia and treatment consisted of librium. It was his opinion claimant was able to work.

Dr. E. L. C. Broomes submitted reports with the most recent, on June 8, 1965, diagnosing epilepsy, duodenal ulcer, neurosis, myocarditis; and it is remarked claimant cannot be gainfully employed.

On July 28, 1965, Dr. Byron Kilgore reported psychiatric examination indicated claimant was fully oriented as to time, place, person and situation. There is no past or current evidence of a psychotic process. There was a tendency to somatization, denial and occasional resort to dissociative black-out spells when angry. Most of his complaints are of a functional or psychogenic nature. If definitive neurological evaluation reveals no organic basis for any of his symptoms, he could be expected to respond to therapy and appropriate medication. Musculature that is probably weakened by relative disuse could be built up in 3 to 6 months so he could move into full socio-economic activities.

On September 25, 1965, Dr. P. V. Westhaysen reported neurological examination revealed no evidence of organic disease or other disorder of the central nervous system. He is normally oriented in time and place and his memory is intact although not completely accurate. He has no obvious behavior disturbance but his mood suggests melancholy and some depression. The claimant has no general physical handicap and is capable of all normal and exertional physical activities. His symptoms suggest illness is on a psychiatric basis.

The Clinic Pharmacy reported on December 18, 1965, that claimant has been having prescriptions filled since October of 1964.

STATEMENT OF THE LAW AND ISSUES

The provisions of the Social Security Act prior to the 1965 amendments allow a person to file for disability insurance benefits at any time within nine months before the first month for which he can be entitled to benefits, where a waiting period is required, and to file for the establishment of a period of disability at any time within three months before the first day that a period of disability can begin for him; and benefits cannot be paid, nor a period of disability established, on an application filed before the time limits listed above.

The 1965 amendments eliminate the requirement that an individual be under a disability at the time his disability insurance benefits application is filed and permit entitlement to benefits and/or freeze claims to be determined (although no benefits are allowable prior to September, 1965) on the basis of an application filed within twelve months after the period of disability ended. The prospective life of an application is extended until the final decision by the Secretary, or a decision upon judicial review thereof, if the claimant is found to meet all the requirements for entitlement to such benefits.

The 1965 amendments continue in effect the special earnings requirements for entitlement to disability insurance benefits or establishment of a period of disability for an individual, namely, that the individual must have not less than 20 quarters of coverage during the 40-quarter period in which the disability began.

The term "disability" was described in sections 223(c)(2) and 216(i)(1) of the Act, prior to amendment in 1965, as an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. Under the revised definition the impairment, or impairments, must be of the same degree of severity as previously, but the 1965 amendments delete from the definition of disability the requirement that the individual's impairment must be one which can be expected to be of long-continued and indefinite duration or result in death and substitute the requirement that the impairment has lasted, or can be expected to last, a continuous period of twelve months, or to result in death.

The term "period of disability" is described as a continuous period of not less than six full calendar months in which an individual was under a disability. A period of disability ends with the close of the second month following the month in which the disability ceases.

On the basis of the foregoing evidence the question before the Hearing Examiner is whether or not the claimant is

entitled to disability insurance benefits and to the establishment of a period of disability under sections 223(a) and 216(i) of the Social Security Act, as amended. The issue is specifically dependent on whether the claimant was under a disability of the required severity and duration beginning at a time when the earnings requirement was met and continuing through the date of the hearing examiner's decision and, if the claimant had been under a disability which has ceased, whether the period of disability ended no more than twelve months earlier than the claimant's application therefor was filed.

EVALUATION OF MEDICAL EVIDENCE AND VOCATIONAL FACTORS

Whether the claimant satisfied the requirements of the statute so that he can obtain disability insurance benefits as well as a disability "freeze" depends upon application of the facts to the definition of the term "disability" in the statute. It is the legal obligation of the claimant to satisfy each test enumerated in the law. It has been held in *Carquerville* v. *Flemming*, 268 Fed. 2d 875, and *Dowell* v. *Folsom*, 157 Fed. Supp. 46, that the burden of proof rests upon one filing a claim with an administrative agency to establish that the conditions of eligibility have been met. Accordingly, the claimant must not only establish the existence of a medically determinable physical or mental impairment of the severity and duration set forth in the statute, within the period in which the special earnings requirements are met, but also prove inability to engage in any substantial gainful activity by reason of such impairment. Satisfaction of one of these two tests is insufficient.

The Social Security Regulations specify that: "In order to establish that a medically determinable physical or mental impairment * * * is present there should be evidence that medically discernible anatomical, physiological, biochemical or psychological aberrations exist. Allegations of inability to work as a result of impairment such as dyspnea (shortness of breath), pain, lack of musculo-

skeletal function, decreased vision or hearing, decreased memory, etc., should be shown to result from structural, physiological or psychological changes which can be identified by the use of clinical and laboratory diagnostic techniques. An alleged impairment is medically determinable only if it can be verified by the use of clinical and laboratory diagnostic techniques." (20 CFR 404.1510(a)).

Consideration of the submitted medical reports and evidence of record takes into account the diagnoses and opinions offered by doctors. Emphasis must be placed, however, upon the results of the physical, clinical and laboratory findings supporting the diagnosed impairments and revealing the extent of dysfunction imposed by such diagnosed conditions.

In this case the claimant's earnings record, as pointed out above, qualifies him for insurance coverage through but not beyond June 30, 1962. Disability as defined in the Act must have existed prior to that date in order for the claimant to be eligible for benefits now. Accordingly, only the evidence relating to the period before that date may be considered material.

The medical reports prior to 1965 do not indicate the existence of epilepsy. Although the June 8, 1965, report of Dr. Broomes listed subjective symptoms described as epileptic seizures, no clinical or objective findings were noted. It is observed that Dr. Westhaysen took note of claimant's history of headaches, dizzy spells and "blackouts" and considering diagnostic procedures including skull x-rays indicating no pathological intracranial calcification and electroenesphalogram indicating no focal abnormality and no seizure discharges, found no disorder of the central nervous system. The hearing examiner finds more persuasive the report of Dr. Westhaysen, a specialist in neurological surgery. Furthermore, the testimony of claimant and his wife was that seizures are less frequent and do not occur often now. The evidence indicates very infrequent spells and that claimant is not prevented thereby from the reasonably regular performance of services.

It is important, moreover, to note that medical authorities feel epileptics should be encouraged to perform some gainful occupation. A Veterans Administration study includes a detailed review and analysis of actual occupations, with specific job descriptions of positions successfully filled on a full-time basis in a large variety of occupations and crafts, by persons with medically established epilepsy. ("Occupations of Epileptic Veterans of World War II and Korean Conflict." VA Pamphlet 22-6, Department of Veterans Benefits, Veterans Administration, January 1960). The job distribution shown by this recent, comprehensive official survey established that persons with unquestionable epilepsy are actually continuously employed and functioning efficiently in substantial gainful activities including but not limited to numerous named jobs. The list includes a number of jobs within claimant's capabilities, and specifically mentions manual work of various sorts including service station attendant and laborer which are within claimant's work experience.

The claimant has alleged inability to work because of a number of conditions mentioned in his application and in the oral testimony. The mere presence of a physical imperfection or other ailments does not establish a statutory disability. As mentioned above, in accordance with the terms of the statute, he must establish not only the existence of a medically determinable physical or mental impairment within the period of insured coverage but also inability to be gainfully employed as a result thereof. The evidence shows that after removal of hemorrhoids in January of 1960, and until 1965, the medical attention received by claimant was from Dr. Fleischer who noted the injury to claimant's cervical spine in 1961, his treatment of claimant for neuroasthenia, and his opinion in 1965 that claimant was able to work. The record does not indicate complaints or treatment of other ailments such as heart or stomach condition, epilepsy or black out spells and does not include reports of any other intervening hospitalization or medical attention. In September of 1965 more than three years after claimant's "insured status" under the Act had expired, an examinaiton by Dr. Westhaysen indicated claimant has no general physical handi-

cap and is capable of all normal and exertional physical activities. Attention was directed to the allegations, oral testimony and the documentary evidence with respect to all of the ailments affecting the claimant but those have not been shown to exist in such severity as to prevent the reasonably regular performance of services at any time when he met the special earnings requirement of the Act.

The medical evidence reflects no psychosis or mental impairment to a degree that would prevent claimant from working. The present era is one in which psychoneurosis afflicts many people but they work with it. Claimant's nervous condition relates to an impairment but does not meet the standards of the law and regulations with respect to disability in this area. Thus, the regulations describe conditions as disabling within the meaning of the Act where there is "Damage to the brain, or brain abnormality which has resulted in severe loss of judgment, intellect, orientation or memory" or "Mental disease (e.g., psychosis or severe psychoneurosis) requiring institutionalization or constant supervision of the affected individual." (20 CFR 401.1502(a)). Such intensive care is not required in the case of claimant but he could benefit from medication and visits to a psychiatrist and working. A need for psychotherapy is not incompatible with occupational activity. Claimant does not have a psychosis and the medical evidence does not indicate a psychotic process in the past; Dr. Kilgore noted that he was fully oriented which was corroborated by Dr. Westhaysen who additionally remarked that claimant's memory is intact, he has no obvious behavior disturbance and there is no evidence of organic disease or other disorder of the central nervous system. The evidence does not establish that the claimant was affected sufficiently by reason of a nervous condition to significantly reduce his ability to perform remunerative work.

FINDINGS

In the light of the entire evidence and of the foregoing considerations, the Hearing Examiner finds that the claimant last met the special earnings requirements of

the law on June 30, 1962, and that the claimant has not established, under the pre-1965 and 1965 definitions of disability, that he has impairments, either singularly or in combination, of such severity as to preclude him from engaging in any substantial gainful activity at any time when he met the special earnings requirement of the Act.

DECISION

It is the decision of the Hearing Examiner that the claimant is not entitled to disability insurance benefits or to a period of disability under the pre-1965 law or the 1965 Amendments of the Social Security Act.

/s/ Maxon N. Rapport
MAXON N. RAPPORT,
Hearing Examiner

Date: February 24, 1966

Mister Sanders, C1 & W/E
A/N 260-36-4656

EXHIBITS

Exhibit No.

1. Claimant's Application for Disability Insurance Benefits filed 1-30-64
2. Copy of disallowance letter dated 6-2-65
3. Claimant's Request for Reconsideration filed 6-7-65
4. Disability Determination by State Agency dated 10-1-65, affirmed by Social Security Administration 10-26-65
5. Copy of Notice of Reconsideration Determination dated 10-29-65
6. Application for Social Security Account Number filed 11-14-44
7. Earnings Record certified 2-5-64
8. Report of Contact with claimant dated 1-30-64
9. Report of Contact with claimant dated 10-19-64
10. Report of Work Activity dated 11-9-64
11. Report of Contact with claimant dated 12-18-64
12. Report of contact regarding date of birth dated 1-15-65
13. Report of Contact with claimant dated 6-7-65
14. Report of Contact with claimant dated 11-16-65
15. Medical report from St. Catherine Hospital dated 2-10-64 covering treatment from 1-14-60 through 1-20-60
16. Medical report signed by Dr. J. C. Fleischer dated 2-16-65 covering treatment in September 1961
17. Report of Contact with Dr. Fleischer dated 1-13-65
18. Medical report signed by Dr. J. C. Fleischer dated 1-13-65

EXHIBITS (Continued)

Exhibit No.

19. Professional Qualifications of Dr. Jacob C. Fleischer
20. Medical report signed by Dr. H. L. C. Broomes (undated) received 12-23-64 covering treatment
21. Report of Contact with Dr. Broomes dated 1-15-65 regarding treatment from December 1964 through 1-14-65
22. Medical report signed by Dr. E. L. C. Broomes dated 6-8-65 covering treatment from 11-5-65 (sic) through 6-8-65
23. Professional Qualifications of Dr. Edward L. C. Broomes
24. Case Development Sheet signed by Dr. Luis F. Gonzalez dated 5-22-65
25. Professional Qualifications of Dr. Luis F. Gonzalez
26. Medical report signed by Dr. Byron Kilgore dated 7-28-65 covering consultative psychiatric examination
27. Professional Qualifications of Dr. Byron Kilgore
28. Medical report signed by Dr. Peter V. Westhaysen dated 9-25-65 covering consultative neurological examination on 8-24-65
29. Professional Qualifications of Dr. Peter V. Westhaysen
30. Case Development Sheet signed by Dr. Ira A. Liebson dated 5-22-65
31. Case Development Sheet signed by Dr. Ira A. Liebson dated 10-26-65
32. Professional Qualifications of Dr. Ira A. Liebson

SUBMITTED DURING ORAL HEARING

33. Note from Clinic Pharmacy, Inc. covering prescriptions filled from October 1964 through December 16, 1965

EXHIBIT #2

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
June 13, 1966

HA:C
Account Number
260-36-4656

ACTION OF APPEALS COUNCIL ON
REQUEST FOR REVIEW

Mr. Mister Sanders
4905 Alexander
East Chicago, Indiana 46312

Dear Mr. Sanders:

Your request for review of the hearing examiner's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the hearing examiner's evaluation of the facts and the reasoning in his decision, and your reasons for believing your claim should be allowed.

The Appeals Council has decided that the decision of the hearing examiner is correct. Further action by the Council would not, therefore, result in any change which would benefit you. Accordingly, the hearing examiner's decision stands as the final decision of the Secretary in your case.

If you desire a review of the hearing examiner's decision by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside *within sixty (60) days* from this date. For your information as to the action in the district court, your attention is directed to section 205 (g) of the Social Security Act, as amended, (section 405

(g), Title 42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

/s/ [Illegible]
[Illegible]
Chairman, Appeals Council

cc: BSB, DDO, Baltimore

D/O, Hammond, Indiana
H/E Rapport, Chicago, Illinois (South)

ITRager:er

EXHIBIT [Illegible]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

Name and Address of Claimant:

TO: Mister Sanders
609 E. 150th St.
East Chicago, IN

NOTICE OF DISMISSAL

Please Read Carefully

If you disagree, in whole or in part, with the enclosed order of dismissal, you may request the Appeals Council to review it. However, your request for review must be filed *within 60 days* following the date shown below. You, or your representative, may file the request for review with your local social security office, with the hearing office, or with the Appeals Council.

This notice and enclosed copy of
order of dismissal mailed

January 15, 1973

cc:
Name and Address of Representative:

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

ORDER OF DISMISSAL

In the case of

Mister Sanders
(Claimant)

(Wage Earner) (Leave blank if same as above)

Claim for

Period of Disability and
Disability Insurance Benefits

260-36-4656
(Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

This case is before the undersigned Administrative Law Judge upon a request for hearing filed on October 3, 1973 by the claimant, Mister Sanders, who disagrees with the determination of the Bureau of Disability Insurance, Social Security Administration, that he is not entitled to a period of disability and disability insurance benefits under the Social Security Act.

The claimant filed a prior application for a period of disability and disability insurance benefits on January 30, 1964. The claimant complained of various impairments in that first application that included epilepsy and "blackout spells" which he alleged caused him to be unable to work for about 4½ years prior to his application of January 30, 1964. On June 2, 1965, the claimant was notified by the Bureau of Disability Insurance Benefits, Social Security Administration that his application

was denied. He requested reconsideration of this denial and was subsequently notified by a letter dated October 29, 1965 that the original denial had been affirmed. Thereafter, the claimant still being dissatisfied filed a request for hearing and a hearing was held on December 21, 1965. The Hearing Examiner (now called Administrative Law Judge) affirmed the Administration on February 24, 1966 and determined that the claimant was not entitled to disability insurance benefits or to a period of disability. The Appeals Council by a letter dated June 13, 1966 notified the claimant that the decision of the Administrative Law Judge was the final decision of the Secretary of Health, Education and Welfare and advised the claimant that he had the right to commence a civil action in the United States District Court within sixty days to review the decision of the Administrative Law Judge. The claimant did not file a civil action for review in the United States District Court.

The claimant filed a second application to establish a period of disability and for disability insurance benefits on March 5, 1973, wherein he again alleged epilepsy and "blackout spells." On May 25, 1973, the claimant was notified by the Bureau of Disability Insurance, Social Security Administration, that his application was denied. He requested reconsideration of this denial and was subsequently notified by letter dated September 28, 1973, that the original denial had been affirmed. Thereafter the claimant still being dissatisfied, filed a request for hearing on October 3, 1973. Since the decision of the Administrative Law Judge on February 24, 1966, the claimant submitted additional medical evidence that indicates that the claimant has complained of epilepsy and "blackout spells" since 1964.

ISSUES AND APPLICABLE LAW

The general issues before the Administrative Law Judge is whether the claimant is entitled to a period of disability and to disability insurance benefits under the Act. The specific issue is whether the claimant is entitled to

have his prior application reopened since more than four years have elapsed since the decision of the Administrative Law Judge on February 24, 1966 and the claimant last met the earnings requirements of the Social Security Act on June 30, 1962.

20 CFR 404.937 provides:

> "The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> > (a) Res judicata. Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision . . ."

20 CFR 404.951 provides:

The Appeals Council may deny a party's request for review or it may grant review and either affirm or reverse the Administrative Law Judge's decision. The decision of the Appeals Council, or the decision of the Administrative Law Judge where the request for review is denied (see 404.947), shall be final and binding upon all parties to the hearing unless a civil action is filed in the district court of the United States under the provisions of section 205(g) or section 1869(b) of the Act, or unless the decision is revised under the provisions described in § 404.956.

20 CFR 404.957 provides in pertinent part:

. . . a decision of a hearing examiner (Administrative Law Judge) which is otherwise final . . . § 404.951 may be reopened:

* * * *

(c) at any time when

* * * *

(8) such . . . decision . . . is unfavorable, in whole or in part, to the party thereto but only for the purpose of correcting . . . error on the face of the evidence on which such . . . decision was based.

RATIONALE

The Appeals Council on June 13, 1966 specifically advised the claimant that the decision of the Administrative Law Judge was the final decision of the Secretary of Health, Education and Welfare and that the claimant had the right to request a review in the United States District Court within sixty days of that final decision pursuant to section 205(g) of the Social Security Act (42 U.S.C. § 405(g)). The claimant did not file for a review in the United States District Court and the decision of the Administrative Law Judge became final and binding upon the claimant. Since more than four years have elapsed since the decision became final it can only be reopened under the provisions of 20 CFR 404.957 (c)(1) through (9). The only possible applicable section is 20 CFR 404.957(c)(8). I find that there is no error on the face of the evidence on which the decision of February 24, 1966 was made.

In order for the claimant to be entitled to a period of disability or to disability insurance benefits, it was necessary for him to establish that he was under a "disability" commencing on or prior to June 30, 1962 when he last met the earnings requirements of the Act. Since the claimant's special earnings requirement expired on June 30, 1962, there is no unadjudicated period subsequent to the final decision of the Secretary on February 24, 1966. The parties and the issues are the same in the both applications and the additional medical evidence is merely repititions and cumulative. The allegations of the claimant and the additional evidence submitted do not warrant a change in the conclusion reached in the prior decision. Any further adjudica-

tion of these identical matters is barred under the doctrine of *res judicata.*

It is well settled that a claimant may not, by filing repeated applications obtain repeated determinations or decisions with respect to the same issues or renew rights which he allowed to lapse by his failure to seek administrative or judicial review within the statutory period for such review. See: *Sangster* v. *Gardner,* 374 F 2d 498 (6th Cir. 1967). *Domizik* v. *Cohen,* 413 F 2d 5 (3rd Cir. 1969); and *Leviner* v. *Richardson,* 443 F 2d 1338 (4th Cir. 1971), and cases cited therein.

FINDINGS

1. That there is no basis for reopening the prior decision of February 24, 1966.

2. That the prior decision of February 24, 1966 is final and binding as to the claimant's application filed on January 30, 1964.

3. That the prior decision of February 24, 1966 as to the claimant's first application filed on January 30, 1964 is *res judicata* as to his current application filed on March 5, 1973 since both applications involved the same parties, issues and facts.

4. That the issue of disability during the previously adjudicated period is dismissed under 20 CFR 404.937 (a).

DECISION

Now therefore, in view of the foregoing, it is the decision of the Administrative Law Judge, that the decision of the Administrative Law Judge on February 24, 1966 on claimant's application of January 30, 1964 is final and will not be reopened, further, pursuant to the provisions of 20 CFR 404.937(a), the request for hearing filed herein on October 3, 1973 by the claimant, Mister Sanders, is hereby dismissed.

/s/ James H. Alesia
JAMES H. ALESIA
Administrative Law Judge

Date: January 15, 1973

EXHIBIT 4

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
5 APR 1974

IRA-2
260-36-4656
AIRMAIL

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW OF ADMINISTRATIVE LAW JUDGE'S DISMISSAL

Mr. Mister Sanders
609 East 150th Street
East Chicago, Indiana 46312

Dear Mr. Sanders:

Your request for review of the administrative law judge's dismissal has been carefully considered by the Appeals Council. The Council's consideration of your case included the law and regulations applicable to your claim, the action taken by the administrative law judge and your reasons for believing that your request for hearing should not have been dismissed.

The Appeals Council has concluded that the dismissal action of the administrative law judge is correct. Accordingly, the determination dated February 24, 1966, stands as the final determination of this Department.

Sincerely yours,

LINDSAY E. MARRIN
Acting Member,
Appeals Council

cc:
Mr. William A. Kowalski
Attorney at Law
East Chicago, Indiana 46312
Division of Benefit Services, Balt.
BO, East Chicago, In
HO. Chicago, Il (ALJ Alesia)

DISTRICT COURT ORDER AND MEMORANDUM

[The District Court Order and Memorandum of November 15, 1974, is printed at pages 13a-14a of the Appendix to the Petition for Certiorari.]

COURT OF APPEALS DECISION AND ORDER

[The Court of Appeals Decision and Order of September 12, 1975, are printed at pages 1a-12a of the Appendix to the Petition for Certiorari.]

DENIALS OF REHEARING

[The Court of Appeals Orders of December 12, 1974, denying petition for rehearing and suggestion of rehearing *en banc*, are printed at pages 15a-18a of the Appendix to the Petition for Certiorari.]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT

v.

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, DEFENDANT-APPELLEE

MOTION TO LODGE ADMINISTRATIVE RECORD

Caspar Weinberger, by his undersigned counsel, hereby requests leave of this Court to lodge the Social Security Administration administrative record with the Court in the above-captioned case. In support of this motion counsel states:

1. Claimant instituted this suit to review a decision of the Secretary of Health, Education and Welfare denying his latest application for social security disability benefits on the ground of *res judicata*. The district court, finding that it lacked subject matter jurisdiction, granted the Secretary's motion to dismiss. The instant appeal raises two issues: (1) Whether the Secretary's decision declining to reopen claimant's prior application may be judicially reviewed; (2) in the event the decision is subject to judicial review, whether that decision was arbitrary, capricious, or an abuse of discretion.

2. Should this Court find itself empowered to review the Secretary's decision on reopening, the Court may wish to consider the entire administrative record. Although this record was not filed with the district court, this Court may, of course, take judicial notice of the administrative record. *Shuttleworth* v. *City of Birmingham, Ala.*, 394 U.S. 147 (1969); *Butler* v. *Eaton*, 141 U.S. 240 (1890); *Wilson* v. *Sigler*, 285 F.2d 372 (C.A. 8, 1961).

WHEREFORE, defendant-appellee respectfully requests that this Court grant his motion and allow the

Social Security Administration's administrative file in the above-captioned case to be lodged with this Court.[1]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 1975, I served the foregoing Motion to Lodge Administrative Record upon counsel for the appellant by causing a copy to be mailed, postage prepaid, to:

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RICHARD A. OLDERMAN,
Attorney

[1] The administrative record is presently in the possession of the Social Security Administration, and we are advised that it will be available within two weeks from today.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

May 1, 1975

Before Hon. Thomas E. Fairchild, Chief Judge

No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT,

vs.

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
(H 74 C 146)

This matter comes before the Court on the "MOTION TO LODGE ADMINISTRATIVE RECORD" filed herein on April 30, 1975 by counsel for the defendant-appellee. On consideration whereof,

IT IS ORDERED that said motion be and the same is hereby GRANTED. The Social Security Administration's administrative file in this matter may be lodged, but not filed, in this Court.

SUPREME COURT OF THE UNITED STATES

No. 75-1443

F. DAVID MATHEWS, Secretary of Health, Education and Welfare, PETITIONER

v.

MISTER SANDERS

ORDER ALLOWING CERTIORARI—Filed June 1, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

Mr. Justice Stevens took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 217752 294

Supreme Court, U. S.
FILED
MAY 8 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1443

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Petitioner,

vs.

MISTER SANDERS,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Petitioner,

vs.

MISTER SANDERS,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Respondent, Mister Sanders, respectfully prays that the Petition for Writ of Certiorari filed herein be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported officially at 522 F 2nd 1167 and is reproduced in Appendix "A" of Petitioner's Petition. The memorandum of the District Court is not reported but it is reproduced in Appendix "C" of Petitioner's Petition.

JURISDICTION

The jurisdictional facts are accurately set forth in Petitioner's Petition.

QUESTIONS INVOLVED

The Questions Presented are as set forth in Petitioner's Petition.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations involved are as set forth in Petitioner's Petition in Appendix "E" thereof.

STATEMENT OF THE CASE

The statement of the case as set forth in Petitioner's Petition is substantially accurate.

ARGUMENT

I.

THE OVERWHELMING WEIGHT OF AUTHORITY HOLDS THAT SECTION 205(H) OF THE SOCIAL SECURITY ACT (42 USC 405H) DOES NOT PRECLUDE REVIEW OF THE SECRETARY'S REFUSAL TO REOPEN PRIOR FINAL DECISIONS AND THAT THE APA (5 USC 701-706) IS THE JURISDICTIONAL BASIS FOR SUCH REVIEW.

See *Ruiz-Olan* v. *Secretary of Health, Education and Welfare* (C.A. 1), 511 F 2nd 1056; *Cappadora* v. *Celebrezze* (C.A. 2), 356 F 2nd 1; *Davis* v. *Richardson* (C.A. 3), 460 F 2nd 772; *Lejeune* v. *Mathews* (C.A. 5), 526 F 2nd 950; *Wallace* v. *Weinberger* (C.A. 6), 528 F 2nd 700; *Sanders* v. *Weinberger* (C.A. 7) 522 F 2nd 1167.

Other Circuits have held that where, as in the case at bar, an allegation of "error on the face of the evidence" is made, then the District Court has jurisdiction to review the Secretary's refusal to reopen for the purpose of determining whether the Secretary's own regulations were properly applied. See *Leviner* v. *Richardson* (C.A. 4), 443 F 2d 1338; *Lauritzen* v. *Weinberger* (C.A. 8), 514 F 2d 561. These circuits find jurisdiction to review the Secretary's refusal to reopen a prior decision without regard to the APA.

Thus the 1st, 2d, 3d, 5th, 6th and 7th Circuits have found a jurisdictional basis to review the Secretary's refusal to reopen prior decisions under the APA while the 4th and the 8th Circuits presume jurisdiction where "error on the face of the evidence" is alleged.

Only the 9th Circuit has held to the contrary. See *Stuckey* v. *Weinberger* (C.A. 9) 488 F 2d 904. It should be noted that the *Stuckey* case was decided *en banc* and that five of the justices filed a concurring opinion in which they asserted that "[we] agree with the Second Circuit, for the reasons set forth in *Cappadora* v. *Celebrezze,* 356 F 2d 1 (2d Cir. 1966), that a limited area of judicial review has been afforded by the Administrative Procedure Act, and that the second sentence of 42 USC Sec. 405(h) should not be construed to preclude judicial review; that that sentence 'simply forbids attempts to review *final decisions on the merits* by any route other than provided in Sec. 405(g).' 356 F 2d at 5 (emphasis supplied)." See *Stuckey* v. *Weinberger, supra.*

(The Secretary incorrectly asserted in the case below that the Tenth Circuit is in accord with his contention, citing as authority *Neighbors* v. *Secretary of Health, Education and Welfare* (C.A. 10), 511 F 2d 80. This error was repeated by the Court below in its footnote No. 7, see *Sanders* v. *Weinberger,* 522 F 2d at P. 1170. A reading of the *Neighbors* case however reveals that the APA was nowhere mentioned or considered by the Court of Appeals for the Tenth Circuit.)

The Secretary maintains that this Court's ruling in *Weinberger* v. *Salfi,* 411 U.S. 749 "logically implies that Act [42 USC 405(h)] bars judicial review of the Secretary's refusal to reopen prior final decisions. . . ." (P. 6 of Petition for Writ of Certiorari). However, the Court below in considering this contention correctly observed that "what, and all that, was before the Court in *Salfi* was whether a denial of benefits could be reviewed by a Court proceeding under 28 USC Sec. 1331 . . . the Court did not consider the review

provisions of the Administrative Procedure Act, however, as it found that review was proper under Sec. 405 (g) of the Act. The decision is thus inapposite to the case before us." *Sanders* v. *Weinberger, Secretary of Health, Education and Welfare,* 522 F 2d at P. 1171. Indeed the APA is nowhere mentioned in this Court's decision in *Salfi.*

II.

JUDICIAL REVIEW OF AGENCY ACTION IS THE RULE AND NON-REVIEWABILITY IS THE EXCEPTION.

The Court below noted that "the Supreme Court has held that there is virtually a presumption of judicial review of administrative action. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967), unless a contrary purpose is fairly discernible in the statutory scheme, *Data Processing Service* v. *Camp,* 397 U.S. 150, 157 (1970). Agency action is normally found to be non-reviewable 'only upon a showing of clear and convincing evidence of a contrary legislative intent.' *Abbott Laboratories* v. *Gardner, Supra,* 387 U.S. at 141. Clearly the absence of statutory language expressly authorizing judicial review is insufficient to offset the presumption that administrative action is reviewable. 'Indeed, judicial review of such administrative action is the rule, and non-reviewability an exception which must be demonstrated.' *Barlow* v. *Collins,* 397 U.S. 159, 166 (1970)." See decision of Court below in *Sanders* v. *Weinberger,* 522 F 2d at P. 1170.

III.

THE ADMINISTRATIVE PROCEDURE ACT CONFERS SUBJECT MATTER JURISDICTION.

In the abstract, there is a division of authority upon this question. (See cases cited by the Court below, 522 F 2d

at P. 1169 as well as the Petitioner's Petition for Writ of Certiorari at P. 12 thereof.) However, with respect to the specific fact question before this Court, *viz,* does the District Court have jurisdiction under the APA to review the Secretary's decision not to reopen for possible abuse of discretion, the Courts which have considered the matter are practically unanimous in holding that the District Court does have such limited jurisdiction. *Ruiz-Olan* v. *Secretary of Health, Education and Welfare, supra; Cappadora* v. *Celebrezze, supra; Davis* v. *Richardson, supra; Lejeune* v. *Mathews, supra; Wallace* v. *Weinberger, supra; Sanders* v. *Weinberger, supra.*

IV.

DENIAL OF THE PETITION FOR WRIT OF CERTIORARI WOULD NOT RESULT IN A "VOLUME OF POTENTIAL RELITIGATION" AS CLAIMED BY THE SECRETARY.

The APA authorizes review of the Secretary's final decision only for an abuse of discretion (5 USC 706 Sec. 10). Here, it is alleged that the Secretary abused his discretion in refusing to reopen a prior decision because of "error on the face of the evidence," particularly since the Secretary's own regulations provide for a reopening of a prior decision *at any time* on such basis. (See 20 CFR 404. 957-8).

Error on the face of the evidence is defined by the Secretary himself as follows: "an error on the face of the evidence exists where, on the basis of all the evidence in the file on which the determination or decision was based and any evidence or record anywhere in the administration at the time such determination or decision was made, it is clear that the determination or decision was incorrect." (as cited in *Lauritzen* v. *Weinberger, supra,* 514 F 2d at P. 563).

It is to be hoped that instances of abuse of discretion in refusing to reopen prior decisions on such basis would be rare indeed. The APA does not authorize successive review of the same factual determinations. The Secretary's apprehension therefore that "persistent claimants would relitigate claims numerous times in hopes of securing a favorable decision" is unfounded and untenable.

CONCLUSION

The issues raised by the Secretary have been considered on numerous occasions by the various Courts of Appeal. Said Courts are nearly unanimous in holding that a jurisdictional basis exists to review the Secretary's refusal to reopen a prior determination either for abuse of discretion under the APA or irrespective of the APA where "error on the face of the evidence" is asserted. Since the leading case of *Cappadora* v. *Celebrezze, supra,* was decided in 1966 only the 9th Circuit in as sharply divided *en banc* decision has held to the contrary. The questions presented by the Secretary have been extensively reviewed. The Petition for Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 20 1976
MICHAEL RODAK, JR., CLERK

No. 75-1443

In the Supreme Court of the United States

OCTOBER TERM, 1976

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

MISTER SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1443

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

MISTER SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-10a) is reported at 522 F.2d 1167. The memorandum of the district court (Pet. App. C, pp. 13a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 11a-12a) was entered on September 12, 1975.

A timely petition for rehearing was denied on December 12, 1975 (Pet. App. D, pp. 15a-16a). On March 4, 1976, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 10, 1976. The petition for a writ of certiorari was filed on April 9, 1976, and was granted on June 1, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Social Security Act precludes judicial review of the action of the Secretary of Health, Education, and Welfare in refusing to reopen a decision denying respondent's claim for disability benefits?

2. Whether the Administrative Procedure Act of its own force grants jurisdiction to the federal courts to review the Secretary's action?

STATUTES AND REGULATIONS INVOLVED

Section 205 of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 405, Section 10 of the Administrative Procedure Act, 5 U.S.C. 701-706, and the regulations of the Department of Health, Education, and Welfare are set forth in pertinent part in the Appendix to this brief, *infra*, pp. 1a-5a.

STATEMENT

1. Under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, a claimant becomes entitled to disability benefits if he can demonstrate, *inter alia*, (1)

that he is disabled within the meaning of the Act because of a physical or mental impairment, and (2) that his disability arose prior to the expiration of his insured status. 42 U.S.C. 416(i), 423. A claim for disability benefits is initiated by filing an application with the Social Security Administration. 20 C.F.R. 404.905-404.907. If the application is denied initially, the claimant is entitled to reconsideration upon request filed within six months of the date of mailing of notice of the initial determination. 20 C.F.R. 404. 909-404.915. If the claimant is still dissatisfied with the decision after reconsideration, he can obtain an evidentiary hearing before an Administrative Law Judge upon request filed within 60 days of receipt of notice of the reconsidered determination. 42 U.S.C. (Supp. V) 405(b); 20 C.F.R. 404.917-404.918.[1] Within 60 days after the mailing of notice of the Administrative Law Judge's decision, the claimant may seek review from the Appeals Council, which has discretionary powers of review. 20 C.F.R. 404.945-404. 947.

After a hearing and final decision of the Secretary, the claimant within 60 days may commence a civil action in a United States District Court to obtain review of the decision. 42 U.S.C. 405(g).

A determination at each successive stage of the administrative proceedings—initial application, reconsideration, Administrative Law Judge's decision, or

---

[1] Prior to February 29, 1976, the request for a hearing was permitted to be made within six months of the date of mailing of notice of the determination. 42 U.S.C. (1970 ed.) 405(b).

Appeals Council decision—concludes the claim if the claimant fails to carry on to the next stage within the prescribed time limits. However, under the Secretary's regulations a final determination or decision may be reopened within stated time limits, measured from the date of notice of the determination: within 12 months as of right, and within an additional three years "upon a finding of good cause," which is deemed to exist if new and material evidence is furnished or specified types of errors are discovered. 20 C.F.R. 404.957(a) and (b), 404.958. Moreover, a final adverse determination or decision may be reopened "[a]t any time," but only for the purpose of correcting clerical error or error on the face of the evidence on which such determination or decision was based (and in certain other limited circumstances not relevant to this case). 20 C.F.R. 404.957(c).

2. Respondent, Mister Sanders, instituted this action in the United States District Court for the Northern District of Indiana for review of a decision of the Secretary of Health, Education, and Welfare, denying respondent's second (1973) application for disability benefits (App. 2-3). The complaint predicated the court's jurisdiction on 42 U.S.C. 405(g), a provision of the Social Security Act. In addition to requesting review of the Secretary's decision, the complaint prayed for an order "consistent with the Court's findings" and for attorney's fees and general relief.

a. This case originated on January 30, 1964, when respondent filed an application for a period of disabil-

ity and disability insurance benefits (App. 32). The application asserted that he had been unable to work for four and one-half years because of epilepsy and black-out spells. This claim was denied initially and upon reconsideration (App. 32-33). Respondent requested a hearing and one was held on December 21, 1965 (App. 33). The Administrative Law Judge (then called a Hearing Examiner) considered the question to be whether respondent was "entitled to disability insurance benefits and to the establishment of a period of disability" under the Act (App. 21-22). He observed that the determination of this question was "specifically dependent on whether the claimant was under a disability of the required severity and duration beginning at a time when the earnings requirement was met and continuing through the date of the" decision (App. 22).

In his lengthy decision after the hearing, the Administrative Law Judge made detailed findings, among them that the claimant was born on March 18, 1929, ended his formal education with the fifth grade, and held a succession of jobs, first as a field laborer and later as a service station attendant, construction worker, and mason's helper. After reviewing extensive medical testimony and considering numerous medical reports and records, the Administrative Law Judge found that the respondent (1) last met the special earnings requirements of the Act on June 30, 1962, and (2) had not established under the applicable definitions of disability that he had "im-

pairments, either singularly or in combination, of such severity as to preclude him from engaging in any substantial gainful activity at any time when he met the special earnings requirement of the Act" (App. 25-26). On June 13, 1966, the Appeals Council sustained the decision of the Administrative Law Judge (App. 29-30). The Appeals Council's decision was the final decision of the Secretary with respect to respondent's claim. 20 C.F.R. 404.951. Respondent was notified of his right to judicial review of the decision, but he did not seek review.

b. On March 5, 1973, respondent filed a second application to establish a period of disability and for disability insurance benefits (App. 33). He again alleged epilepsy and black-out spells as the basis of the disability. The second application was denied. Respondent requested reconsideration and was subsequently notified that the denial had been affirmed. He filed a request for hearing on October 3, 1973, and submitted additional evidence that he had complained of epilepsy and black-out spells since 1964 (App. 33).

Since respondent had last met the earnings requirements of the Act on June 30, 1962, to succeed on his 1973 application he would have had to prove the very fact he had failed to establish in connection with his earlier application, *i.e.*, disability commencing no later than that date. Accordingly, the Administrative Law Judge concluded that respondent's new application was barred by *res judicata* (App. 36). On that view of the case, the Administrative Law Judge identified

the issue as "whether the claimant is entitled to have his prior application reopened" (App. 33-34). In refusing to reopen the prior application, the Administrative Law Judge noted that "the additional medical evidence is merely repititions [*sic*] and cumulative" (App. 35) and found that "there is no error on the face of the evidence on which the decision of February 24, 1966 was made" (*ibid.*).

Respondent thereafter sought administrative review of the dismissal of his request for a hearing. On April 5, 1974, the Appeals Council notified respondent that it had affirmed the dismissal and that accordingly the Administrative Law Judge's decision of February 24, 1966, stood as the final decision of the Secretary (App. 37).

c. Respondent then instituted this action for review. By an order dated November 15, 1974, the district court granted the Secretary's motion to dismiss (App. 38). The court held that since the Administrative Law Judge had found that the case was not a proper one for reopening and had denied the claimant's hearing request on the basis of *res judicata*, the district court was without jurisdiction to hear the action (Pet. App. C, pp. 13a-14a). On respondent's appeal, the court of appeals reversed in a 2-1 decision (Pet. App. A, pp. 1a-10a).

The court of appeals agreed with the district judge and the Secretary that jurisdiction to review a refusal to reopen a claim proceeding could not be based upon the Social Security Act (Pet. App. A,

p. 5a). However, the court determined that the Social Security Act did not absolutely preclude review, and it held that the Secretary's denial of reopening was final agency action which the district court had jurisdiction to review under Section 10 of the Administrative Procedure Act, 5 U.S.C. 701-706. The majority took note of a split in authority on the issue, but said it was adopting the view advanced in *Cappadora* v. *Celebrezze*, 356 F. 2d 1 (C.A. 2), and followed in a number of circuits, that the APA contains an independent grant of jurisdiction to review the Secretary's denial of reopening in a disability claim case. The court acknowledged that *Weinberger* v. *Salfi*, 422 U.S. 749, which was handed down after argument of this case, precludes use of the general federal-question statute, 28 U.S.C. 1331, as a basis for jurisdiction to hear Social Security claims, but said that *Salfi* had not considered the APA and hence was "inapposite" here (Pet. App. A, pp. 8a-9a). The dissent rested on the ground that "the simple language of the statute involved forbids judicial review of the decision of the Secretary not to reopen the determination" (Pet. App. A, pp. 9a-10a).

SUMMARY OF ARGUMENT

Federal courts are without jurisdiction to entertain the respondent's suit for judicial review of the Secretary's refusal to reopen a decision made years earlier denying a disability benefits claim. The Social Security Act precludes such a suit because it fails

to satisfy the Act's prerequisites for jurisdiction to review. Both in language and purpose the Act is clear in its design to avoid disrupting the administration of the great volume of Social Security benefit applications, which are ordinarily disposed of by the agency through fair and effective procedures. All courts that have considered the question have agreed that the Act does not confer jurisdiction to review the Secretary's refusal to reopen a claim. That conclusion is entirely consistent with this Court's recent decision in *Mathews* v. *Eldridge*, 424 U.S. 319. That case holds that the Act's prescribed conditions for resort to the courts do not bar suits where, by following the required administrative procedures, the claimant would incur the very injury he sought to obviate.

As for the Administrative Procedure Act as a basis for jurisdiction, there is nothing in its language, history or interpretation by this Court to support the position that of its own force it confers jurisdiction over agency action on the district courts, assuredly not in a case like the present one. The APA's thrust is procedural and remedial, not jurisdictional. It grants broad powers of review to courts that have been otherwise jurisdictionally empowered, but it does not itself accord the power. To hold that it does would risk impairing necessary repose in the administration of Social Security claims, and flooding the courts with great numbers of stale and insubstantial cases.

ARGUMENT

I

THE SOCIAL SECURITY ACT PRECLUDES JUDICIAL REVIEW OF THE SECRETARY'S REFUSAL TO REOPEN A DECISION DENYING A CLAIM FOR DISABILITY BENEFITS

A. Section 205(h) of the Act Bars Federal Courts from Reviewing Decisions of the Secretary Save as Jurisdiction is Granted by Section 205(g) of the Act

In fiscal year 1975, more than 7,600,000 application claims were made under programs created by the Social Security Act; more than 120,000 hearing requests were processed and there were 5,052 new filings in the courts. Social Security Administration, *The Year in Review—The Administration of Social Security Programs 1975* 54, 78, 79 (February 1976). Volume has climbed steeply in the last few years, as is vividly shown by looking back only to 1973 to the figures cited in *Stuckey* v. *Weinberger*, 488 F.2d 904 (C.A. 9) (*en banc*), to evidence "the vast number of claims processed annually by the SSA" (488 F.2d at 910, n. 13):

> In fiscal 1971, the SSA received 5,062,932 applications for benefits; 45,697 appeal hearings were held; and more than 1,600 petitions for review were filed in the United States District Courts. * * *

The administrative procedures specified in Section 205 of the Act provide multiple safeguards intended to ensure that claimants for benefits receive a high

level of protection. Each claimant is entitled to have his claim reviewed three and possibly four times in the administrative process. See pp. 3-4, *supra*; see also *Stuckey* v. *Weinberger*, *supra*, 488 F.2d at 910. If a claim is rejected finally for substantive reasons, the disappointed claimant may take his case to the courts by proceeding in a timely fashion, subject to the rules Section 205 of the Act prescribes as to the scope and standards of review.

Thus, the plan of the statute is clear and salutary. As the statistics show, applications for benefits are in almost all cases settled in the course of routine administration. If issues arise requiring additional attention, they ordinarily are disposed of through the Social Security Administration's internal processes for receiving, considering, hearing, appealing, and determining claims. Judicial review is the exception, not the rule, in these cases. Section 205(h) immunizes the Secretary's decisions from judicial review other than as explicitly provided for in the Act by stating, in its second and third sentences:

> No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

Section 205(g), in turn, provides for review of the Secretary's decisions in only a defined category of cases.

That the preclusive language in Section 205(h) was intended to foreclose any review by courts "except as herein provided," *i.e.*, except as provided by Section 205(g), is not in doubt. *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 764.

The clear meaning of the second sentence of Section 205(h) is to bar judicial review of decisions by the Secretary save for those that can be reviewed under Section 205(g). As we develop more fully below (pp. 16-23), *infra*), a decision as to reopening is not one that comes within the latter section: the court of appeals conceded that nothing in the Act "expressly" authorizes review of such decisions (Pet. App. A, p. 5a), and we will demonstrate that nothing in the Act—or outside of it—impliedly authorizes such review. Beyond that, and more immediately, the third sentence of Section 205(h) specifically precludes the courts from exercising jurisdiction originating outside the Social Security Act to review any action by the Secretary on a Social Security claim.

The court below incorrectly concluded that the preclusive effect of the third sentence of Section 205(h) is limited solely to the invoking of federal-question jurisdiction under 28 U.S.C. 1331 and does not bar the exercise of asserted jurisdiction under the Administrative Procedure Act, 5 U.S.C. 701-706. Apparently underlying that view is the theory that since Section 205(h) was enacted in 1939 and in terms bars only actions brought under former "section 41 of Title 28," it does not apply to the APA, which was enacted in 1946 and was not comprehended in 28 U.S.C. (1946 ed.) 41. The argument,

in short, is that jurisdictional statutes that became law after Section 205(h) and were not enacted as amendments to former 28 U.S.C. (1946 ed.) 41, escape the impact of the final sentence of Section 205(h) and confer jurisdiction over Social Security claims.

In *Weinberger* v. *Salfi*, *supra*, this Court at least inferentially rejected the argument that the preclusive effect of Section 205(h) should be limited in that manner. In that case a widow and stepchild were denied insurance benefits on the basis of the duration-of-relationship requirements of the Act, the marriage having occurred less than nine months before the wage-earner's death. They filed a class action for declaratory and injunctive relief in which they attacked the nine-month requirement as unconstitutional, predicating jurisdiction on 28 U.S.C. 1331 (former 28 U.S.C. (1946 ed.) 41) and also on the mandamus statute and the Administrative Procedure Act. See *Weinberger* v. *Salfi*, No. 74-214, Appendix p. 7. Since the unnamed members of the class had failed to satisfy the jurisdictional requirements of Section 205(g), this Court held that the district court lacked jurisdiction over the claims, observing that "[o]ther sources of jurisdiction [are] foreclosed by [Section 205(h)]" (422 U.S. at 764).[2]

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[2] In 1966 the Second Circuit had concluded that the provisions of Section 205(h), precluding review of the Secretary's decisions save as permitted in Section 205(g), did not bar review of decisions refusing to reopen a claim. *Cappadora* v. *Celebrezze*, 356 F. 2d 1. To reach that conclusion the court gave Section 205(h) only the limited effect of confining review of a "final decision * * * made after a hearing" to the means

The *Salfi* decision advances the evident congressional objective of freeing the courts from the enormous burden that would fall upon them if, at stages of the administrative process other than specified in Section 205(g), disappointed claimants were free to initiate suits to overturn adverse agency actions. This objective is apparent on a close reading of Section 205 (h). By virtue of the second sentence of that provision, the claimant desiring to attack any "findings of fact or decision of the Secretary" is remitted to the exclusive review process "herein provided," *i.e.*, by Section 205(g). The third sentence deals comprehensively with all actions involving claims under Title II of the Social Security Act, whether or not adjudication of those claims would entail review of

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prescribed in Section 205(g), and construed it as not precluding or restricting review of an agency action that did not fit the description of a "final decision made after a hearing". *Id.* at 5. This Court's decision in *Salfi* rejected the *Cappadora* interpretation of those sections. It explicitly stated that the provisions of Section 205(h) "prevent review of decisions of the Secretary save as provided in the Act, which provision is made in" Section 205(g). 422 U.S. at 757.

This Court's construction in *Salfi* is the only sound one. It avoids the anomaly created by the construction in *Cappadora* —*i.e.*, that decisions disposing finally of the substantive merits of a Social Security claim must comply with restrictive conditions of access to judicial review under the Act, while interlocutory, insubstantial, or repetitive applications enjoy unrestricted access as far as the Act is concerned. Congress could not have intended so perverse a scheme, as this Court recognized in the passage quoted above from *Salfi*. The Second Circuit now apparently acknowledges that the *Cappadora* construction is inconsistent with *Salfi*. See *South Windsor Convalescent Home, Inc.* v. *Mathews*, C.A. 2, No. 75-6136, decided July 27, 1976.

findings of fact or a decision by the Secretary. Since at the time the Act became law former 28 U.S.C. (1946 ed.) 41 was the encompasing provision granting federal-question jurisdiction and embraced every permissible type of suit that might arise under the Social Security program, the purpose of the two sentences is unmistakable.[3] Congress intended to preclude suits based on Social Security claims, save for the special channel it carved out for review of decisions meeting the requirements of Section 205(h). Neither the Administrative Procedure Act in 1946 nor any other later-enacted statute should be construed as an implied nullification of the careful congressional plan. Moreover, since 1946 Congress has confirmed its faith in the vitality of that plan by incorporating Section 205(h) by reference in other programs under the Social Security Act: in Title XVIII (Medicare), 42 U.S.C. 1395ii, in Title XVI (Supplemental Security Income), 42 U.S.C. (Supp. V) 1383(c)(3); and see, also Title IV (Black Lung Benefits), Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. (Supp. V) 923(b). Those incorporations of Section 205(h) would have no purpose if medicare and the other designated benefit claims were to be allowed unconfined judicial access and review

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[3] In *Salfi*, this Court said (422 U.S. at 756, n. 3): "The literal wording of [Section 205(h)] bars actions under 28 U.S.C. § 41. At the time [Section 205(h)] was enacted, and prior to the 1948 recodification of Title 28, § 41 contained all of that title's grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes."

going outside the route specified by the Social Security Act.

In the absence of any statutory language expressly modifying the plan of agency-court relations prescribed so deliberately in the Social Security Act, the argument of implied change in the jurisdictional balance should be rejected.[4] The plain and obvious meaning of Section 205(h) is that a decision of the Secretary is reviewable, if at all, only under Section 205(g).

B. Section 205(g) Does Not Authorize Judicial Review of the Secretary's Decisions on Reopening Claims.

The court of appeals acknowledged that review was not authorized here by Section 205(g) (Pet. App. A, p. 5a). That conclusion reflects the apparently unbroken line of cases[5] on the question of reviewability under that statute of decisions as to reopening. See, *e.g.*, *Maddox* v. *Richardson*, 464 F.2d 617, 621 (C.A. 6); *Stuckey* v. *Weinberger*, *supra*, 488 F.2d at 909; *Cappadora* v. *Celebrezze*, *supra*, 356 F.2d at 4-5 (C.A. 2); *Davis* v. *Richardson*, 460 F.2d 772, 775 (C.A. 3); *Ortego* v. *Weinberger*, 516 F.2d 1005, 1007-1008 (C.A. 5); *Neighbors* v. *Secretary of Health, Education and Welfare*, 511 F.2d 80, 81 (C.A.

[4] Nothing in the legislative history of the Administrative Procedure Act suggests a congressional intention to revamp completely the scheme for review of Social Security cases.

[5] *Ortego* v. *Weinberger*, 516 F. 2d 1005, 1007 (C.A. 5): "All courts agree that the Social Security Act does not, by its terms, provide for judicial review of refusals to reopen."

10). It also reflects the plain meaning of the statute in accordance with this Court's decision in *Salfi*.

Entitled "Judicial review," Section 205(g) reads in part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * *

The requirements for judicial review that emerge from that sentence and related provisions of Section 205(g) were set out clearly in *Salfi* (422 U.S. at 763-764):

> * * * (1) a final decision of the Secretary made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision (or within such further time as the Secretary may allow); and (3) filing of the action in an appropriate district court, in general that of the plaintiff's residence or principal place of business. * * *

Respondent's claim does not qualify under those standards, for as this Court said in *Salfi*, it is "central to the requisite grant of subject-matter jurisdiction" under the statute that the Secretary's decision be of a particular type—"that type being [one that is] 'final' and 'made after a hearing'" (422 U.S. at 764).

The Secretary's refusal to reopen a previously ad-

judicated claim satisfies neither requisite. Manifestly such a refusal is not "made after a hearing" within the meaning of the statute.[6] In using that language, Congress evidently intended to reserve judicial review for administrative actions that disposed of claims with respect to which the claimant had been afforded a right to a prior hearing. See Section 205(b). See also, *e.g.*, *Cappadora* v. *Celebrezze*, *supra*, 356 F. 2d at 4; *Ortego* v. *Weinberger*, *supra*, 516 F. 2d at 1007; *Filice* v. *Celebrezze*, 319 F. 2d 443, 445-446 (C.A. 9). But there is no entitlement to a hearing on a request to reopen a previously adjudicated claim; determinations of such requests are properly made without a hearing and not "after a hearing."

Furthermore, the Secretary's determination against reopening a claim is not a "final decision" within the meaning of Section 205(g). That phrase, incorporating as it does a requirement of exhaustion of administrative remedies, necessarily refers to the final disposition of a claim for benefits on its merits. That "final decision" in this case was made years before this action was brought. As the Appeals Council ruled on April 5, 1974, in refusing to reopen respondent's application, "the determination dated February 24, 1966, stands as the final determination of this De-

[6] Moreover, although in this case there had been a hearing upon respondent's earlier application for benefits, many if not most reopening cases will involve efforts to reopen applications that have not progressed to the hearing stage. In those situations the Secretary's decision whether to reopen will not be made, even in the barest temporal sense, "after" any hearing.

partment" (App. 37). This Court noted in *Salfi* (422 U.S. at 766) that "[t]he term 'final decision' is not only left undefined by the Act, but its meaning is left to the Secretary to flesh out by regulation." The Secretary has done so by providing that the final decision denying a claim for benefits stands as the "final decision" unless and until the application is reopened. 20 C.F.R. 404.951. That provision is manifestly reasonable.

In short, under Section 205(g), respondent was required to bring suit for review within 60 days of that 1966 decision or not at all. A "final decision" was rendered on respondent's claim, and the time for seeking review passed, long before his action was instituted in district court. It would largely defeat the congressional goal of administrative finality, and burden the courts with repetitive efforts to revive stale claims, to construe the phrase "final decision" as encompassing all post-adjudication refusals by the Secretary to reopen closed matters.

Our reading of Section 205(g) finds substantial support by analogy to *Securities and Exchange Commission* v. *Louisiana Public Service Commission*, 353 U.S. 368. The question there was whether a Commission order denying a petition to reopen was subject to judicial review. The issue arose under a provision of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U.S.C. 79k(b), which provided:

> * * * Any order made under this subsection shall be subject to judicial review as provided in section 79x of this title.

In turn, Section 79x provided for review in the court of appeals within 60 days after issuance by the Commission of its order. This Court held that the court of appeals lacked jurisdiction to review the refusal to reopen, observing (353 U.S. at 371-372) that judicial review was limited to orders of the Commission that were "directory" or that revoked or modified directory orders, and that "the quoted language does not include an order merely denying a petition to reopen * * * proceedings."

Similar analysis here compels the conclusion that Section 205(g) grants the district courts jurisdiction to review only substantive determinations denying benefits and not subsequent refusals to reconsider such determinations. Indeed, this is an *a fortiori* case, for Section 205(g) does not grant judicial review of "any order," but only of "any final decision * * * made after a hearing," language that manifestly encompasses a narrower class of agency decisions. At a minimum, therefore, Section 205(g) should be read to bar review of the kind of post-adjudication determination involved here and in *Louisiana Public Service Commission.*

This Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319, is not to the contrary. In that case, this Court upheld the district court's jurisdiction to entertain a suit to enjoin the Secretary from terminating the plaintiff's Social Security disability benefits without a prior hearing. Since the Secretary's decision to terminate benefits, by the very nature of the case, had not been made "after a hearing," the

Secretary argued that the requirements of Section 205(g) had not been met, that review could be sought only after exhausting post-termination administration procedures. In rejecting that argument, this Court in effect held that insofar as the principal purpose of Section 205(g) is to impose an explicit requirement of exhaustion of administrative remedies, it should be construed as incorporating the exception to the nonstatutory doctrine of exhaustion that a claimant need not exhaust procedures if as a result of doing so he must incur the very injury that his suit was intended to obviate. See, *e.g.*, *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U.S. 56. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134. As the Court noted in *Eldridge* (424 U.S. at 331):

> A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post-deprivation hearing. * * * In light of the Court's prior decisions,* * * Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments.[7]

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[7] Similarly, this Court's acceptance of the Secretary's waiver of the requirement of finality as to the named plaintiffs in *Salfi* presumably reflected recognition of another exception to the nonstatutory doctrine of exhaustion, that administrative procedures need not be exhausted when the plaintiff's sole con-

Such considerations are not relevant here. There is no question in this case concerning the comprehensiveness of Section 205(g)'s exhaustion requirement. The question, rather, is whether a claimant who, having exhausted the administrative procedures and then having failed to seek review in a timely manner, may reactivate Section 205(g) jurisdiction by requesting the administrator to reconsider his claim. A sensible policy of judicial review, as well as the statutory language, requires that a negative answer be made to this question. The decision whether to reopen stale claims is one that may appropriately be left to nonreviewable administrative resolution. The questions considered in making such decisions, such as whether new and material evidence has been presented, or whether there is error on the face of the record, unlike the questions presented in *Salfi* and *Eldridge*, for example, are not of constitutional magnitude. The interests of the claimants who have no statutory entitlement to reopening and have passed up judicial review of the merits of their claims, are outweighed by society's interests in a rational allocation of scarce judicial resources.

The language of Section 205(g) affords no basis for the assertion of jurisdiction to review reopening decisions. The broad jurisdictional bar of the third sentence of Section 205(h)—"[n]o action * * * shall

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tention is that the statute administered is unconstitutional. See, *e.g.*, *Public Utilities Commission* v. *United States*, 355 U.S. 534. See generally 3 Davis, *Administrative Law Treatise* § 20.04 (Supp. 1970).

be brought * * * to recover on any claim"—when read together with the unavailability to respondent of review under Section 205(g), meets the requirement that there be demonstrated "a congressional meaning to prohibit judicial review [of respondent's claim]." *Dunlop* v. *Bachowski*, 421 U.S. 560, 567. Accordingly, even if jurisdiction is otherwise conferred by the Administrative Procedure Act—a conclusion we dispute below (pp. 23-41, *infra*)—such jurisdiction was foreclosed here because "statutes preclude judicial review." 5 U.S.C. 701(a)(1). See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 764.

II

THE ADMINISTRATIVE PROCEDURE ACT DOES NOT CONFER JURISDICTION ON THE FEDERAL COURTS TO REVIEW THE SECRETARY'S DECISION

We have argued above that respondent's suit is precluded by the Social Security Act since it fails to satisfy the Act's prerequisites for seeking judicial review. If the Court agrees with that submission, it need not consider the further question whether jurisdiction to hear respondent's suit otherwise is granted by the Administrative Procedure Act, 5 U.S.C. 701-706. We discuss that question here, submitting that such jurisdiction is not affirmatively authorized and that it cannot be implied.

1. The Court below incorrectly held that the APA confers independent jurisdiction on the federal district courts to review agency action. That holding misconceives the language, history, and very purpose

of the APA. It mistakes provisions that regulate the particular procedures, forms, and standards for judicial review of claims of legal injury for provisions that grant jurisdiction to hear and decide whole classes of lawsuits. It transforms language prescribing what judges may do in actions properly before them into authorization to bring these actions into their courtrooms. If that view of its impact were accepted, the APA would sweep in a vast jurisdiction over administrative agencies and government officials, unrestricted by the limitations contained in either the general jurisdiction grants in Title 28 [8] or the special statutes covering particular agencies.

This far-reaching authority was ascribed by the court of appeals to the provisions of the APA codified at 5 U.S.C. 701-706. These provisions, collectively designated as Section 10 of the APA, comprise the "judicial review" portion of the statute. The judicial review part of the statute was only one of twelve sections of the enactment, and was by no means the most renowned part of it. The APA was enacted with the ambitious aim of thoroughly reforming administrative agency operations. The reforms were intended to afford persons affected by administrative action the means of knowing their rights and the procedures for protecting them. S. Doc. No. 248, 79th Cong., 2d Sess. 304 (1946). From the

[8] Among these are 28 U.S.C. 1331 (federal questions); 1333 (admiralty claims); and 1337 (interstate commerce). The amount-in-controversy requirement is the most important limitation on jurisdiction under Section 1331.

agencies' standpoint, the APA was a charter of essential principles regulating how they were to function. The Act required them to issue information about their organization and procedures; delineated the essentials of various forms of administrative proceedings and the limitations on administrative powers; laid down requirements for administrative hearings and decisions; and also contained rules on how judicial review was to be conducted and made effective. Although important, the provisions covering judicial review were not intended to bring about the kind of dramatic change in the jurisdiction of the courts to oversee the agencies that the decision of the court of appeals necessarily implies.

The language of Section 10 plainly shows that its thrust is procedural and remedial, not jurisdictional. A brief preliminary overview of its coverage demonstrates this. It begins by excluding from its judicial review provisions any challenged agency actions that other statutes preclude from judicial review, and any actions that are by law committed to agency discretion. Thus, in its opening provision Section 10 shows its singular concern for the problem of which types of agency action will be subject to its judicial review provisions; it reflects no interest in the jurisdiction of federal courts. The remaining provisions of Section 10 amplify its concern with review procedures and remedies.

A person suffering legal wrong from agency action is declared to be entitled to judicial review. The

form of the proceeding is to be that specially provided by statute or, in the absence of such provision, an appropriate common-law proceeding. The kinds of agency actions that are reviewable are described. Provision is made for the reviewing court to preserve the status of matters before it, pending conclusion of the review proceedings. Finally, an enumeration is provided of the types of determinations a reviewing court may render.

Although courts purporting to construe the APA have not undertaken a section-by-section analysis of its text, such an analysis is necessary.

As we have indicated, Section 701 of Title 5 of the United States Code is concerned with the applicability of the succeeding provisions of the APA:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

We demonstrated above (pp. 22-23, *supra*) that subparagraph (a)(1) is effective here because the Social Security Act "preclude[s] judicial review." Subsection (a)(2) similarly applies: since Congress chose not to create a statutory entitlement to reopening, and instead left the decision whether to reopen a previously adjudicated application entirely to the Secretary's discretion, that decision in nonreviewable under the APA as "agency action * * * committed to agency discretion by law." As the Ninth Circuit

stated in *Stuckey* v. *Weinberger*, *supra*, 488 F. 2d at 910:

> * * * [T]he Congress intended * * * to commit irrevocably to agency discretion those decisions which are rendered after full and fair agency hearings * * *. Thus committed, these decisions are beyond the jurisdiction of the courts under both the [Social Security] Act and the APA.

See also *Ortego* v. *Weinberger*, *supra*, 516 F. 2d at 1011.

But even if the judicial review provisions of the APA were deemed applicable on some theory that Section 701 does not foreclose applicability of Sections 702-706 to this case, analysis of the text, history, and purpose of those provisions should lead this Court to reject the court of appeals' view that they themselves grant the federal courts jurisdiction by implication. Section 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 702 does not address the question of the competence or jurisdiction of federal courts to entertain complaints regarding agency action. Its focus is on making known which categories of persons are entitled to judicial review in courts that possess jurisdiction by virtue of grants of authority elsewhere

conferred. A person seeking review must point to such a grant of authority in order to establish that the court is empowered to hear claims of legal injury through agency action. When that is done and entitlement shown, the right of review comes into being and will be vindicated by procedures and remedies set forth in Section 702. Nothing in its language can be stretched to imply an independent grant of jurisdiction over an undefined range of grievances.[9]

Section 703 makes the sole use of the word "jurisdiction" discoverable in any material APA provision. In pertinent part it states:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter *in a court specified by statute* or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, *in a court of competent jurisdiction.* [Emphasis supplied.]

The insistence that the proceedings must be brought "in a court specified by statute" or "in a court of competent jurisdiction" conveys the strong implication that the APA does not itself vest jurisdiction in federal courts.[10] Both clauses look to outside sources

[9] See Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3568, pp. 466-467 (1975): "This language * * * says nothing that fairly can be read as a grant of jurisdiction."

[10] See Wright, Miller & Cooper, *supra*, at 467: "The limitation to a court of 'competent jurisdiction' makes no sense if the statute itself is a grant of jurisdiction."

of authority and presuppose that the court of appropriate jurisdiction has been identified and invested with power by a provision of law that appears elsewhere in the books.[11] If the APA had intended to confer jurisdiction, it would have identified the courts that were to be competent. The absence of jurisdictional language cannot be explained away as unconcern for technical language. Where Congress has intended to confer jurisdiction, it has chosen language that made that intention plain. Section 205 (g) of the Social Security Act, for example, specifies that a claimant may obtain judicial review of a final decision of the Secretary by bringing an action "in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or * * * in the United States District Court for the District of Columbia." The contrast between that formulation and the langauge of the APA is stark. Whereas in Section 205 (g) the claimant is directed to particular courts that are specifically empowered to entertain his suit, the APA merely remits a claimant to "a court of competent jurisdiction," if any. Congress thus manifested its purpose to leave court jurisdiction in this area unchanged.

[11] Cf. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389, 417-418 (1970). Professor Jaffe has said of Section 703 that it appears "to do no more than incorporate by reference existing jurisdiction." Jaffe, *Judicial Control of Administrative Action* 164 (1965).

The same observation applies to Section 704, which in pertinent part reads:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

Section 704 was included to make clear the kinds of agency actions that were to be judicially reviewable under the APA's processes. As throughout, the emphasis was on the matter of review, not jurisdiction. Actions "directly" reviewable consisted of those specifically made so by statute—whether final or not —and also final actions for which no court remedy other than judicial review would be adequate (subject, of course, to existence of a jurisdictional basis). Actions "not directly reviewable," the second sentence of Section 704 makes clear, were to be any agency orders or rulings of a preliminary, procedural or intermediate nature. These were to be obliged to await final agency action. They then would become reviewable upon the review of the final action. The legislative history fully bears out this reading: the Senate Committee Report declares that Section 704, in "defining reviewable acts, is designed also to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available * * *." S.Doc. No. 248, 79th Cong., 2d Sess. 37 (1946). It

follows, as a matter of both language and history, that Section 704 cannot correctly be construed as conferring jurisdiction.

Sections 705 (dealing with relief pending review) and 706 (defining the scope of review when a court engages in reviewing agency action) are not relevant to the issues presented.

2. The legislative history of the APA reinforces the teaching of its text that the congressional intent was to clarify procedural standards for court review of administrative action, not to create a new basis of jurisdiction. When Congress enacted the APA in 1946, the federal jurisdictional statute of general scope was 28 U.S.C. (1946 ed.) 41, later codified as Section 1331, providing in part:

> The district courts shall have original jurisdiction of all civil actions wherein the amount in controversy exceeds the sum or value of $3,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.

The difficulty of meeting the amount-in-controversy requirement of that statute has been the major obstacle to using it as the basis of jurisdiction in suits to review the legality of actions of federal officers. That situation obtained also in 1946. Persistent criticism of the requirement recently has eventuated in passage by the Senate of S.800, 94th Cong., 2d Sess. (1976), which would end the prerequisite of a dollar-measured amount in controversy in suits based on asserted unlawful action by federal officials.

The Federal Declaratory Judgment Act, 28 U.S.C. (1946 ed.) 400, later codified as Sections 2201, 2202, was also in force in 1946. In pertinent part it provided:

> In a case of actual controversy *within its jurisdiction* * * * any court of the United States * * * may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought * * *. (Emphasis supplied.)

The Declaratory Judgment Act was not construed as an independent grant of jurisdiction to review agency action.[12] To bring a case "within its jurisdiction" a court would have to find authority to do so in some source external to that Act.[13]

In context, if the APA in 1946 had broadened the competence of the federal courts by permitting judicial review of any claim of legal wrong in consequence of agency action, it would have been effecting a momentous expansion of federal jurisdiction. The proposal would have set off a vigorous debate that would have been reported thoroughly. In fact, contemporaneous legislative documents show nothing of the sort. The absence of discussion of the issue of jurisdictional enlargement is highly indicative that

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[12] See, *e.g.*, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667; Wright, Miller & Cooper, *Federal Practice and Procedure* § 2766 (1973).

[13] A comparable reference appears in Section 703 of the APA, requiring that a permitted form of proceeding be brought "in a court of competent jurisdiction." See p. 28, *supra*.

the APA was not intended to have the effect of granting wide-ranging jurisdiction over agency actions.

In response to a request by Congress for comments prior to passage of the APA, the Attorney General described it as "legislation * * * designed to deal horizontally with the subject of administrative procedure." S. Doc. No. 248, *supra*, at 223, 406. He rejected the idea "that there is anything inherent in the subject of administrative procedure * * * which defies workable codification." *Id.* at 224, 407. With specific regard to Section 10 he stated that "this section, in general, declares the existing law concerning judicial review." S. Doc. No. 248, *supra*, at 229. In particular, the Attorney General stated that Section 10(c) (now 5 U.S.C. 704), regarding actions reviewable, "is intended to state existing law." S.Doc. No. 248, *supra*, at 230. Because of the substantial role the Department of Justice played in aiding Congress' consideration of the APA, particular significance attaches to a Department memorandum apparently also furnished by the Attorney General (*id.* at 415):

> Section 10 as to judicial review does not * * * make any real changes in existing law. * * * It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned * * * that it will change existing doctrine of judicial review which has been settled for the particular agency * * *. I

> feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there would be no difficulty for any agency.

Those reassurances were consistent with the purposes of the bill to provide for public information, administrative operation, and judicial review. *Id.* at 304.

3. A number of circuits have held in diverse contexts that the APA of its own force grants jurisdiction to review agency action.[14] As many other circuits have held the opposite.[15] The commentators are also divided on the issue.[16]

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[14] See, *e.g.*, *Elton Orchards, Inc.* v. *Brennan*, 508 F.2d 493 (C.A. 1); *McEachern* v. *United States*, 321 F.2d 31 (C.A. 4); *Ortego* v. *Weinberger*, *supra*; *Bard* v. *Seamans*, 507 F.2d 765 (C.A. 10); *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (C.A. D.C.).

[15] See, *e.g.*, *Grant* v. *Hogan*, 505 F. 2d 1220 (C.A. 3); *Bramblett* v. *Desobry*, 490 F. 2d 405 (C.A. 6), certiorari denied, 419 U.S. 872; *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F. 2d 529 (C.A. 8); *Nguyen da Yen* v. *Kissinger*, 528 F. 2d 1194 (C.A. 9). The Second Circuit appears to consider the question still open. *South Windsor Convalescent Home, Inc.* v. *Mathews*, C.A. 2, No. 75-6136, decided July 27, 1976. And some circuits have decided the question both ways. Compare, *e.g.*, *Davis* v. *Richardson*, 460 F.2d 772 (C.A. 3), with *Grant* v. *Hogan*, 505 F. 2d 1220 (C.A. 3); *Bramblett* v. *Desobry*, *supra*, with *Hunt* v. *Weinberger*, 527 F. 2d 544 (C.A. 6).

[16] Compare Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308 (1967), Davis, *Administrative Law Treatise* § 23.02 (Supp. 1976), and Jaffe, *Judicial Control of Administrative Action* 165 (1965) with Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389, 445 (1970), Wright, Miller & Cooper, *Federal Practice and Procedure* § 3568 (1975), Comment, *The Jurisdictional Basis of Nonstatutory Judicial Review in Suits Against Federal Officers—Jurisdictional Amount, the Administrative Procedure Act and Mandamus*, 51 Wash. L. Rev. 97, 114-115 (1975), and Project, *Federal Administrative Law Developments—1971*, 1972 Duke L.J. 115.

Some who find an affirmative grant of jurisdiction in the APA rely in part on this Court's decisions in *Rusk* v. *Cort*, 369 U.S. 367, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402. Those decisions did not decide this question.

In *Rusk* v. *Cort*, an action was brought for declaratory and injunctive relief, challenging the determination of the Secretary of State that the plaintiff had lost his citizenship under Section 349(a)(10) of the Immigration and Nationality Act of 1952 by remaining outside the United States for the purpose of avoiding military service. The district court denied the Secretary's motion to dismiss, which was based upon the claim that Section 360(b) and (c) of that Act prescribed the exclusive procedure for obtaining judicial relief (an action for habeas corpus against the Attorney General upon reentry), and held Section 349(a)(10) unconstitutional. This Court affirmed the denial of the motion to dismiss, concluding that the review procedure prescribed by Section 360(b) and (c) was not exclusive and that the Secretary's determination was therefore subject to review under

"the broadly remedial provisions of the Administrative Procedure Act" (369 U.S. at 379-380). Although the Court at one point couched the question presented in terms of jurisdiction (369 U.S. at 370), it is clear that jurisdiction as such had been conferred by 28 U.S.C. 1331: plaintiff alleged a deprivation of his basic right of citizenship, and it has long been understood that such an allegation satisfies the statute's amount-in-controversy requirement. See *Wiley* v. *Sinkler*, 179 U.S. 58. The question actually decided by the Court in *Cort* concerned reviewability, not jurisdiction. The essence of the Secretary's argument was that his determination was not subject to direct judicial review, that no cause of action arose until plaintiff was detained by the Attorney General upon reentry. In rejecting that argument, the Court stated (369 U.S. at 372):

> On their face the provisions of [the Declaratory Judgment Act and the Administrative Procedure Act] appear clearly to permit an action * * * to review the final administrative determination of the Secretary of State. This view is confirmed by our decisions establishing that an action for declaratory judgment is available as a remedy to secure a determination of citizenship—decisions rendered both before and after the enactment of the Administrative Procedure Act.

The passage clarifies that the Court was rejecting a defense of nonreviewability, not one of lack of jurisdiction. If the issue had been whether the APA confers jurisdiction, neither decisions prior to its enactment nor the nonjurisdictional Declaratory Judgment Act would have been relevant. By referring to such decisions, it is clear that the Court was invoking the pre-existing common law doctrine of the reviewability of administrative actions that was codified in the APA and was not deciding the question of jurisdiction presented here.[17]

Similarly, *Abbott Laboratories* v. *Gardner* and *Citizens to Preserve Overton Park* v. *Volpe* concerned questions of reviewability, not of statutory jurisdiction. In *Abbott Laboratories*, the issue was whether pre-enforcement judicial review of a particular class of regulations issued by the administrator was implicitly precluded by the Federal Food, Drug, and Cosmetics Act's provision for such review of a different class of regulations. In holding that it was not, the Court noted (387 U.S. at 142; footnotes omitted):

> At the time the Food, Drug, and Cosmetic Act was under consideration, in the late 1930's, the Administrative Procedure Act had not yet been enacted, the Declaratory Judgment Act was in its infancy, and the scope of judicial review of administrative decisions under the equity power was unclear. It was these factors that led to the form the statute ultimately took. There

[17] Accordingly, we disagree with the suggestion that the Court in *Cort* decided the question of APA jurisdiction "inadvertently and without focus on the problem." Davis, *Administrative Law Treatise* § 23.02 (Supp. 1976). But even if the Court had assumed the existence of APA jurisdiction in that matter, the issue would remain open for decision in a case in which it is squarely presented, with full briefing and oral argument. Cf. *Edelman* v. *Jordan*, 415 U.S. 651, 670-671; *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90, 95.

> is no evidence at all that members of Congress meant to preclude traditional avenues of judicial relief. Indeed, throughout the consideration of the various bills submitted to deal with this issue, it was recognized that "There is always an appropriate remedy in equity in cases where an administrative officer has exceeded his authority and there is no adequate remedy of law, * * * [and that] protection is given by the so-called Declaratory Judgments Act * * *." H.R. Rep. No. 2755, 74th Cong., 2d Sess., 8.

Since Congress was of the view that the administrator's decisions generally would be reviewable, and since in prescribing a particular form of review for some decisions Congress had not explicitly precluded review of others, those other decisions continued to be subject to review after the enactment of the APA as they had been before. Having so concluded, the Court was not required to discuss the separate question of statutory jurisdiction in view of the nature of the case, which involved commercial interests that could be assumed to have a value substantially in excess of the amount-in-controversy requirement of 28 U.S.C. 1331.

In *Citizens to Preserve Overton Park* the "threshold question" was stated explicitly in terms of reviewability, not of statutory jurisdiction (401 U.S. at 410). Once again, the interest at stake substantially exceeded the jurisdictional minimum prescribed by 28 U.S.C. 1331, so that reliance upon the APA was necessary only to prove a right to judicial review, not to establish subject-matter jurisdiction.

These decisions recognize and implement a presumption favoring judicial review. But a presumption favoring judicial review cannot be transformed into a presumption in favor of jurisdiction—to say nothing of a *per se* grant of jurisdiction. And here, unlike *Rusk*, *Abbott Laboratories*, and *Overton Park*, jurisdiction under 28 U.S.C. 1331 is plainly unavailable, because of the explicit bar of the third sentence of Section 205(h) of the Social Security Act. The actual teaching of *Rusk*, *Abbott Laboratories*, and *Overton Park* is that congressional silence in an agency-creating statute as to how to enter the courts to challenge the agency's actions is not conclusive evidence of an intent to withhold all judicial oversight. In the three cases the plaintiffs raised issues of law. These issues were of types particularly well suited to judicial determination. They did not present any narrow, highly fact-filled issue calling for discretionary choice, such as the issue of reopening a previously denied claim for disability benefits. Moreover, the underlying statutes in those cases did not furnish a fair and comprehensive procedure for obtaining court review of the substance of the claim. Here, the Social Security Act did precisely that, and it was only the claimant's prior choice to forego the adjudication that was his for the asking that gives rise to the problem.

Focusing upon the jurisdictional issue in a case of this kind, Section 10 of the APA can be seen for what it is and what it is not:

> The better reasoned view, followed by most of the circuit courts which have considered the problem, is that section 10 does *not* confer jurisdiction. It increases access to judicial review by widening the definition of reviewable actions, but does so only for already jurisdictionally empowered courts * * *. This view is supported by the absence of any reference to statutory jurisdiction in the legislative history of the APA and, as a matter of statutory construction, by the express language of the APA. [Project, *Federal Administrative Law Developments—1971*, *supra*, 1972 Duke L. J. at 230 (emphasis in original; footnotes omitted).]

A difference often overlooked must be kept in view. When a court obeys legislative authorization to review agency action for conformity to the legal rules, it vindicates the legislature's exact purpose. When it exercises jurisdiction to review agency decisions that were committed to other processes, a court may jeopardize the due functioning of the entire administrative program. Here, a coherent plan for testing the correctness of the agency's decision on the heart of the claim was written into the underlying substantive statute. Provision was made for entry into the federal courts, both as to manner and time. Superimposing a different and delayed path of court entry upon the statutory plan—a path that the claimant could retrace repeatedly at will—would threaten serious disruption of the due administration of the Social Security Act. Cf. *Brown* v. *General Services Administration*, No. 74-768, decided June 1, 1976. "At some point the benefit of an additional safeguard

to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 348. That point would be passed if the federal courts were charged with unqualified jurisdiction to review the Secretary's refusals to reopen stale Social Security claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1976.

APPENDIX

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such

individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. * * *

2. Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

3. The Administrative Procedure Act, 5 U.S.C. 701(a), provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

4. The Administrative Procedure Act, 5 U.S.C. 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5. The Administrative Procedure Act, 5 U.S.C. 703, provides:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

6. The Administrative Procedure Act, 5 U.S.C. 704, provides in part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

7. 20 C.F.R. 404.937 provides in part:

> The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> (a) *Res judicata.* Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision * * *.

8. 20 C.F.R. 404.957 provides in part:

> An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final * * * may be reopened:
>
> (a) Within 12 months from the date of the notice of the initial determination * * * to the party to such determination, or
>
> (b) After such 12-month period, but within 4 years after the date of the notice of the initial determination * * * to the party to such determination, upon a finding of good cause for reopening such determination or decision, or

> (c) At any time when:
>
> * * * * *
>
> (8) Such * * * determination or decision * * * is unfavorable * * * to the party thereto but only for the purpose of correcting clerical error or error on the face of the evidence on which such determination or decision was based.
>
> * * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 220037 305

FOR ARGUMENT

Supreme Court, U. S.
FILED
NOV 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1443

F. DAVID MATHEWS, SECRETRARY OF HEALTH, EDUCATION AND WELFARE,

Petitioner,

v.

MISTER SANDERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF CASE

The Statement of the case as set forth in Petitioner's Brief at pp. 2-8 thereof is substantially accurate and the same is adopted by Respondent.

SUMMARY OF ARGUMENT

The Petitioner, the Secretary of Health, Education and Welfare, hereinafter called Secretary, maintains that Section 205(h) of the Social Security Act (SSA) precludes judicial review of reopening petitions because the only jurisdictional basis of review from decisions of the Secretary is Section 205(g) and that that Section does not provide for such review; and, that the Administrative Procedure Act (APA) is not an independent grant of jurisdiction and therefore cannot serve as the jurisdictional basis for the review of reopening petitions.

Section 205(h) of the Act is 42 USC Section 405(g), and Section 205(g) of the Act is 42 USC Section 405(g) of the Act.

Respondent Sanders maintains that Section 205(h) of the Act is not a preclusion of District Court review of reopening petitions. The vast weight of authority which has considered the matter in the factual context of the case at bar so holds. Additionally, there is a presumption of reviewability of administrative decisions unless a clear statutory intention to the contrary is manifest. No such intention is manifest in the SSA itself or in the legislative history thereof.

Most cases find the jurisdictional basis under the APA to review the Secretary's denial of reopening petitions for possible abuse of discretion. Other cases hold that the District Court correctly entertains jurisdiction to review subsequent applications or so-called petitions to reopen without regard to the APA and without discussing the jurisdictional question. These latter cases state merely that the classic defense of Res Judicata should not be unyielding where the administrative decision is manifestly erroneous; and that the dictates of equity and fundamental fairness require that

an erroneous administrative decision should not remain undisturbed because of the Res Judicata Doctrine.

Recent Surpreme Court Decisions have so liberalized the construction of Section 205(g) of the Act that that very Section may provide the jurisdictional basis to review reopening petitions.

The Secretary's own regulation providing for reopening of prior determinations at any time for error on the face of the evidence extends indefinitely the time for filing review of denials thereof under Section 205(g) of the Act.

Since APA jurisdiction is limited to an ascertainment of abuse of discretion relative to reopening petitions and since petitions for reopening filed more than four years after the decision on the merits can be reopened only for manifest error on the face of the evidence there will not be, and there has not been, a plethora of relitigation of old claims.

The APA is an independent grant of subject matter jurisdiction and the respondent Sanders adopts the arguments contained in Section III of Amicus Curiae brief in this regard.

ARGUMENT

I.

THE SOCIAL SECURITY ACT DOES NOT PRECLUDE JUDICIAL REVIEW OF THE SECRETARY'S REFUSAL TO REOPEN A DECISION DENYING A CLAIM FOR DISABILITY BENEFITS.

A. Section 205(h) of the Social Security Act 42 USCA 405(h) is not a preclusion of District Court jurisdiction to review decisions of the Secretary except as provided in Section 205(g) of the Act 42 USCA 405(g).

1. Preface to Argument.

In most cases involving a so-called "Petition to Reopen" a prior decision, the Petition is in fact a new application addressed to the same claim previously denied by the Secretary. It is not unusual for a claimant to file two or more subsequent applications after an initial denial. Frequently, it is after the denial of such a subsequent application that an attorney enters the picture and files appropriate civil action in the District Court. See for example, *Maddox v. Richardson*, 464 F.2d 617 (6th Cir. 1974).

Almost uniformly, the Secretary will dismiss the subsequent application on the basis of administrative res judicata pursuant to SSA Regulation No. 4 (20 CFR 404.937). If District Court civil action is filed subsequent thereto, the Secretary will plead a Motion to Dismiss the complaint on the following basis: Since the subsequent application was dismissed by the Secretary on the basis of res judicata, the decision of the Secretary was one made without a "hearing"; that Section 205(g) of the Act is the sole jurisdictional basis of review; and that since the "hearing" requirement of Section 205(g) is absent in a case so dismissed by the Secretary on the basis of administrative res judicata, then the District Court is without jurisdiction to entertain the action before it.

The older cases to be sure have endorsed the logic of the Secretary and subsequent applications were dismissed. See for example *Felice v. Celebrezze*, 319 F.2d

443 (9th Cir. 1963). In 1966, the case of *Cappadora v. Celebrezze*, 356 F.2d 1 (2nd Cir. 1966) was decided. This case involved the dismissal by the Secretary of a subsequent application on the basis of res judicata. In recognizing District Court jurisdiction to review, the Court reasoned that the subsequent application for benefits may be regarded as a petition to reopen the initial determination, particularly since such a procedure is recognized by the Secretary's regulations concerning reopening (20 CFR 404.957). It would follow, the Court reasoned, that the District Court should be permitted to review the Secretary's refusal to reopen the initial determination but only for the limited purpose of ascertaining an abuse of discretion in so doing pursuant to the Administrative Procedure Act. See 5 USC 701-706. "The application can be considered in effect . . . a discretionary reopening of the 1954 determination under the Administrative Regulations." *Cappadora v. Celebrezze, supra*, at page 3.

A line of cases evolved following the *Cappadora* doctrine using the APA as the underlying basis of jurisdiction to review. Other cases, as discussed below, find or presume jurisdiction to review such determinations on other bases–particularly where the record discloses error on the face of the evidence.

In the instant case, Respondent Sanders filed a subsequent application for benefits after a prior application for the same benefits was denied by the Secretary. Having no attorney, Sanders did not file a District Court civil action to review the Secretary's denial. More than 4 years later, Sanders refiled an identical application. The Secretary dismissed the subsequent application on the basis of administrative res judicata pursuant to 20 CFR 404.937. It was at this point that Sanders retained counsel and the civil action by way of complaint was filed in the District Court which

complaint alleged, inter alia that the prior determination contained "error on the face of the evidence." See complaint at page 2 of the Appendix.

Again, the Secretary filed a Motion to Dismiss the complaint on the basis that the application for benefits was denied on the basis of administrative res judicata; that such a denial is made without a "hearing"; that Section 205(g) is the only basis for review; that since there was no "hearing" the requirements of Section 205(g) review were not met; that therefore there was no subject matter jurisdiction in the District Court to review the complaint of Sanders. With this argument the District Court agreed and the complaint was dismissed. Sanders filed appropriate appeal on the 7th Circuit Court of Appeals which reversed on the basis that jurisdiction exists under the APA.

Consistent with the authorities cited herein, Sanders contends that his subsequent application for benefits be treated as a Petition to Reopen the initial determination because of error on the face of the evidence, contained therein.

2. The overwhelming weight of authority holds that Section 205(h) of the SSA does not preclude review of the Secretary's refusal to reopen prior final decisions.

The following cases which so hold further decide that the basis of jurisdiction in such situation is the Administrative Procedure Act (APA) 5 USC 701-706: *Ruiz-Olan v. Secretary of Health, Education and Welfare* (C.A. 1 1975), 552 F.2d 1056; *Cappadora v. Celebrezze* (C.A. 2 1966), 356 F.2d 1; *Davis v. Richardson* (C.A. 3 1972), 460 F.2d 772; *Lejeune v. Mathews* (C.A. 5 1975), 526 F.2d 950; *Wallace v. Weinberger* (C.A. 6 1976), 528 F.2d 700; *Sanders v.*

Weinberger (C.A. 7 1976), 522 F.2d 1167. Other Circuits have noted District Court jurisdiction to review the Secretary's refusal to reopen prior decisions or subsequent applications without regard to the APA: See, for example, *Grose v. Cohen* (C.P. 4 1969, 406 F.2d 823) and *Lauritzen v. Weinberger* (C.A. 8 1975) 514 F.2d 561.

Thus the First, Second, Third, Fifth, Sixth and Seventh Circuits have found a jurisdictional basis to review the Secretary's refusal to reopen prior decisions under the APA while the Fourth and the Eighth Circuits find jurisdiction without regard to the APA as is hereinafter discussed.

Only the Ninth Circuit has held to the contrary. See *Stuckey v. Weinberger* (C.A. 9 1973) 488 F.2d 904. It should be noted that the Stuckey case was decided *en banc* and that five of the Justices filed a concurring opinion in which they asserted that "we agree that a limited area of judicial review has been afforded by the Administrative Procedure Act and that the second sentence of 42 USC Section 405(h) should not be construed to preclude judicial review; that the sentence 'simply forbids attempts to review final decisions on the merits by any route other than provided in Section 405(g).'" See *Stuckey v. Weinberger, supra*, at page 912.

The majority view follows the lead of *Cappadora v. Celebrezze, supra*, wherein the Court reasons as follows: "Although it could be argued that the second sentence of Section 405(h) of the Social Security Act is a statutory preclusion of such review, the more reasonable construction is that this simply forbids attempts to review final decisions on the merits by any route other than provided in Section 405(g)." 356 F.2d at page 5. Therefore, under the *Cappadora* view, since Section 205(h) does not expressly exclude the APA as a basis

to review reopening petitions then by implication the APA is available for such purposes.

3. There is a presumption of judicial review and where the statutory intention is not clear, the presumption of review should prevail.

Such is the holding of Case Law and Text Writers. The Social Security Act makes no provision for review of decisions of the Secretary except such decisions as are made after a hearing. There remains therefore a category of decisions by the Secretary for which no review provision is made. Included in this category are decisions of the Secretary refusing to reopen prior determinations as in the instant case. It is conceded that the Social Security Act makes no express provision for a review of the Secretary's decision in refusing to reopen a prior determination. It should be conceded equally however that the Statute 205(h) does not preclude review by its express terms. The intention of the Statute is at best therefore unclear in which case the presumption of reviewability should prevail. As stated by the Court below: "The Supreme Court has held that there is virtually a presumption of judicial review of administrative action. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), unless a contrary purpose is fairly discernible in the statutory scheme, *Data Processing Service v. Camp*, 397 U.S. 150, 157 (1970). Agency action is normally found to be non-reviewable 'only upon a showing of clear and convincing evidence of a contrary legislative intent.' " *Abbott Laboratories v. Gardner, supra*, 387 U.S. at 141. Clearly the absence of statutory language expressly authorizing judicial review is insufficient to off-set the presumption that administrative action is reviewable. Indeed, judicial review of such administrative action is the rule, and

non-reviewability an exception which must be demonstrated.' " *Barlow v. Collins*, 397 U.S. 159, 166 (1970). See decision of Court below in *Sanders v. Weinberger*, 522 F.2d at page 1170. Likewise, the text writers support the presumption of reviewability. "In most cases, statutes or common law decisions make clear the reviewability of an administrative action at the suit of at least one or more classes of potential plaintiffs. But in cases of statutory ambiguity or silence, and in new situations in which there are factors pro and con, the issue of reviewability may become acute. In such situations the presumption of reviewability plays a decisive role." Jaffe, *Judicial Control of Administrative Action*, page 336. See also Gellhorn, *Administrative Law and Process*, pages 245-246; and 4 Davis *Administrative Law Treatise*, Section 28.04, 28.05 (1958).

4. Section 205(h) of the Social Security Act does not preclude review under the APA.

There is no mention of the APA in Section 205(h). The proviso of that Section is simply this: There shall be no review of final decisions of the Secretary made after a hearing except pursuant to the procedure outlined in Section 205(g) and, further, that no Social Security actions shall be instituted under Section 42 of Title 28 (U.S.C. 1331). The Administrative Procedure Act was enacted in 1946, some seven years after the enactment of Section 205(h) of the Social Security Act. Obviously then Section 205(h) did not contemplate the APA. As was noted in the dissenting opinion written by Justice Brenan in *Weinberger v. Salfi*, 422 U.S. 749 "... but the sentence does not say that no action of any kind shall be brought under Section 1331, or other general grants of jurisdiction. ..." And as stated by five Justices in the concurring opinion of *Stuckey v.*

Weinberger, supra "... that a limited area of judicial review has been afforded by the Administrative Procedure Act and that the second sentence of 42 USC 405(h) should not be construed to preclude judicial review...." And as stated by the Court in the leading case of *Cappadora v. Celebrezze, supra*, "the fact that reopening is a matter of agency discretion to a considerable extent ... does not lead inevitably to a conclusion that such an exercise of administrative power is wholly immune from judicial examination; Section 10(e) of the Administrative Procedure Act expressly authorizes the Courts to set aside any administrative decision constituting an abuse of discretion."

Again, the vast majority of Circuits which have considered the applicability of the APA in the specific factual context before this Court have held that Section 205(h) does not preclude review of decisions of the Secretary for an abuse of discretion under the APA. *Ruiz-Olan v. Secretary of Health, Education and Welfare, supra; Cappadora v. Celebrezze, supra; Davis v. Richardson, supra; Lejeune v. Mathews, supra; Wallace v. Weinberger, supra; Sanders v. Weinberger, supra.*

5. The legislative history of the SSA fails to reveal an intention to preclude review of Petitions to Reopen prior determinations.

Despite the speculations of the secretary, a search of the legislative history of the SSA fails to reveal the true intention with regard to the interpretation of Section 205(h) from the standpoint of Reopening Petitions.

It should be observed, however, that if the true intent of Congress was to preclude all judicial review except for final decisions made after a hearing, the draftsmanship of the Act leaves much to be desired.

Certainly the more reasonable interpretation of Section 205(h) as observed by the Court in *Cappadora* is that "... the more reasonable construction is that this [Section 205(h)] simply forbids attempts to review final decisions on the merits by any route other than provided in Section 405(g)." [42 USC 405(g)]. *Cappadora v. Celebrezze*, at page 5.

Ten years have passed since the leading case of *Cappadora v. Celebrezze* decided that Section 205(h) does not preclude review under the APA. Since then numerous courts have followed *Cappadora*'s lead. The Congress has had adequate opportunity to amend the statute if the Courts were erroneously interpreting it. Obviously, no such action on the part of Congress has taken place. In January, 1976, Public Law 94-202 (Social Security Act–Hearing and Review Procedures) was enacted. This law extensively amends the hearing and review procedures of the Social Security Act, but no mention is to be found in the legislative history of the Act or in the Act itself of an intent to nullify the *Cappadora* holding. See Congressional Record Volume 121 (1975); 89 statutes 1135 (1976).

6. Recent Supreme Court cases hold that the District Court is not precluded by Section 205(h) from reviewing decisions under Section 205(g) even though the literal requirements of a "final decision after a hearing" have not been met.

In *Weinberger v. Salfi*, 422 USC 749 (1975) as well as in *Mathews v. Eldridge*, 424 U.S. 319 (1976) the Court held that the District Court does indeed have jurisdiction to review decisions of the Secretary even though such decisions are not such as were made after a hearing. In each of the foregoing cases the Court held that the requirement of a hearing may be waived.

The classic argument of the Secretary based upon *Felice v. Celebrezze, supra*, is that there is no avenue of review under the Social Security Act except Section 205(g); and that where the literal requirements of a final decision made after a hearing are absent there can be no review of any decision of the Secretary. Clearly, these Supreme Court decisions contradict this argument.

B. Three bases of jurisdiction exist to review reopening petitions: The Administrative Procedure Act, Section 205(g) of the Social Security Act and the inherent power of the Court to review decisions containing error on the face of the evidence.

1. Jurisdiction exists under the Administrative Procedure Act.

The provisions of the Federal Administrative Procedure Act, 5 USC 701-706 are found at pp. 2A and 3A of Appendix to Petitioner's Brief. As previously noted, the leading case of *Cappadora v. Celebrezze, supra*, found a jurisdictional basis of review in the APA, and since that time numerous circuits have followed the *Cappadora* reasoning. *Ruiz-Olan v. Secretary of Health, Education and Welfare, supra; Davis v. Richardson, supra; Lejeune v. Mathews, supra; Wallace v. Weinberger, supra; Sanders v. Weinberger, supra.* The *Cappadora* Court stated that "... Section 10E of the Administrative Procedure Act expressly authorizes the Courts to set aside any Administrative decision constituting an abuse of discretion."

Only the sharply divided Court in *Stuckey v. Weinberger, supra*, has held to the contrary, with five Justices in a concurring opinion stating that "we agree

with the Second Circuit for the reasons set forth in *Cappadora v. Celebrezze* ... that a limited area of judicial review has been afforded by the Administrative Procedure Act...." 488 F.2d at page 912.

The principal argument of the Secretary denying the applicability of the APA to review Reopening Petitions is that (a) Section 205(h) precludes such review as above discussed, and (b) the APA is not an independent grant of jurisdiction. The latter subject is treated separately below.

2. Section 205(g) of the Social Security Act is a jurisdictional basis to review Reopening Petitions.

This contention is admittedly at odds with the cases following *Cappadora* wherein it is expressly held that Section 205(g) is not the jurisdictional basis for such review because the literal requirements of a "final decision made after a hearing" are absent in such decisions.

As noted above the recent Supreme Court cases of *Weinberger v. Salfi, supra*, and *Mathews v. Eldridge, supra*, have liberalized the interpretation of Section 205(g) by holding that its requirement of a hearing is not indispensable to District Court jurisdiction under that Section.

Certain pre-*Cappadora* decisions held that a denial of a subsequent application did satisfy the 205(g) requirements of a final decision after a hearing even though the subsequent application was dismissed by the Secretary without a hearing. See for example, *Langford v. Fleming*, 276 F.2d 215 (5th Cir. 1960).

In the Brief of Amicus Curiae, a further basis of Section 205(g) jurisdiction is advanced which may be summarized as follows: Since Section 205(b) of the Act mandates a hearing whenever requested on an

application for payment of benefits, and since the subsequent application of Respondent in this case is an application for benefits under Section 205(b) then the hearing requirement of Section 205(g) is met and therefore the District Court has jurisdiction to review. The matter of Section 205(g) jurisdiction is extensively discussed at Section I of Amicus Curiae Brief. Respondent adopts the arguments of Amicus Curiae so set forth in Section I of its Brief.

There is another basis upon which Section 205(g) may provide jurisdiction for District Court review of Reopening Petitions as discussed in paragraph B 4 below.

3. The District Court has inherent power to review Administrative decisions of the Secretary which contain error on the face of the evidence.

Without discussing the jurisdictional basis therefor, an impressive line of authority has evolved from the Fourth and the Eighth Circuits holding that the District Court has jurisdiction to review the Secretary's denial of subsequent applications or of so-called reopening petitions for the purpose of ascertaining whether the record contains error on the face of the evidence. *Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969); *Leviner v. Richardson*, 443 F.2d 1338 (4th Cir. 1971); *Easley v. Finch*, 431 F.2d 1351 (4th Cir. 1970); *Harrah v. Richardson*, 446 F.2d 1 (4th Cir. 1971); *United States v. Smith*, 482 F.2d 1120 (8th Cir. 1973); *Lauritzen v. Weinberger*, 514 F.2d 561 (8th Cir. 1976).

By virtue of the Secretary's own regulations, certain decisions are non-final. Such decisions are those that contain error on the face of the evidence. Therefore, the reasoning of these decisions seems to be that there is jurisdiction to review the determination of whether the record contains error on the face of the evidence.

The regulation in question is codified at 20 CFR 404.957 and which in pertinent parts states as follows: "An initial, revised or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final . . . may be reopened: . . . (C) at any time when . . . (8) such . . . determination or decision . . . is unfavorable . . . to the party thereto but only for the purpose of correcting . . . error on the face of the evidence on which such determination or decision was based." 20 CFR 404.957-C-8.

Error on the face of the evidence has been defined in the Social Security Administration Claims Manual as follows: "An error on the face of the evidence exists where, on the basis of all the evidence in the file on which the determination or decision was based and any evidence or record anywhere in the Administration at the time such determination or decision was made, it is clear that the determination or decision was incorrect." Social Security Claims Manual Section 7015; cited in *Lauritzen v. Weinberger, supra*, 514 F.2d at page 563.

The leading case in this area is *Grose v. Cohen, supra.* In *Grose*, the record revealed that the Secretary incorrectly attributed to Grose all of the earnings from his paper route and the Secretary incorrectly found that Grose alone could operate the paper route whereas the uncontradicted evidence disclosed that Grose could not operate the paper route without help and assistance from members of his family. After the denial of his claim for benefits by the Secretary, Grose failed to prosecute a civil action for review in the District Court within sixty days pursuant to Section 205(g) of the Act. At a later date however Grose filed a subsequent application for the same benefits. In typical fashion the Secretary interposed the defense of res judicata and asked that the subsequent application be dismissed. In

rejecting the Secretary's contention, the Court in *Grose* distinguished Administrative res judicata from judical res judicata and stated that Administrative res judicata should not be as rigid and unyielding as judicial res judicata; that when traditional precepts of res judicata do not work well in administrative law they should be relaxed; particularly since the Secretary's own regulations recognize that it is undesirable to attribute finality to every administrative decision, citing the reopening regulation 20 CFR 404.957-C-8. The *Grose* Court stated that "while the regulation is couched in terms of reopening a decision otherwise final, it also serves to identify decisions that should not be interposed to deny subsequent applications. A decision that is subject to being reopened provides an inappropriate bar. *The dictates of equity and fundamental fairness* that allow a decision containing error on the face of the evidence to be reopened preclude use of the same decision as a foundation for res judicata." *Grose v. Cohen, supra*, emphasis supplied.

In following the lead of *Grose*, the Courts in the 4th and the 8th Circuits variously announced the reasons for rejecting the defense of res judicata as a bar to subsequent applications. In *United States v. Smith, supra*, the Court stated that administrative res judicata is not applied with the same rigidity as its judicial counterpart because practical reasons may exist for refusing to apply it, citing *Grose*; and in *Leviner v. Richardson*, likewise quoting *Grose*, the Court states that res judicata is no bar where clearly there is error in the prior determination.[1] In *Lauritzen v. Weinberger,*

[1] *Leviner v. Richardson, supra*, involves a Reopening Petition within four years of the decision on the merits of good cause, pursuant to 20 CFR 404.958. The Regulation provides that error on the face of the evidence is included in good cause.

supra, after discussing the *Grose* principle, the Court states "the question is whether an injustice has been done." In *Harrah v. Richardson, supra,* and in *Easley v. Finch, supra*, the Court referred to "manifest error on the face of the evidence" as supplying the basis for the well established exception to the doctrine of res judicata. The Court in *Easley* states "in *Grose* . . . we recognize that the doctrine res judicata is not to be so inflexibly applied to work manifest injustice. In keeping with that principle we held the doctrine inapplicable in a case where the Secretary's decision was founded on error manifest on the face of the record. In so holding we did no more than apply an exception so well recognized that it is codified in the Social Security regulation 20 CFR Section 404.957."

The Courts in the 4th and 8th Circuits do not grapple with the jurisdictional issue nor with the applicability of the Administrative Procedure Act. Jurisdiction may well be predicated upon the presumption of review as set forth in Section A3 hereof, or upon a liberal interpretation of the literal requirements of Section 205(g). Indeed the Court in *Leviner* at footnote 9 of the decision notes that the action is being prosecuted pursuant to Section 205(g). Certainly the later cases of this Court in *Salfi v. Weinberger* and *Mathews v. Eldridge* would lend support to such an interpretation. Prior to its adoption of the *Cappadora* view, the 5th Circuit entertained jurisdiction to review a subsequent application without discussing the jurisdictional basis therefor. See *Craig v. Finch,* 416 F.2d 721 (5th Cir. 1969).

There is an undercurrent in the 4th and 8th Circuit decisions indicating that there is always jurisdiction to review the applicability of the Secretary's own regulations, or as held in *Leviner v. Richardson, supra*, to determine whether res judicata was properly applied.

Even in the single most important precedent relied upon by the Secretary–*Stuckey v. Weinberger, supra*–the Court states at page 911 of the decision "of course judicial review is available to determine the validity of the regulations themselves."

In the case at Bar the District Court dismissed the complaint without attempting to review the record of the prior proceeding for error on the face of the evidence even though such error was alleged in the complaint. The Court below noted that the record was not available in the District Court because the Secretary refused to provide it. See decision in case below *Sanders v. Weinberger*, 522 F.2d at page 1169. Obviously then, the District Court could not have concerned itself with the Record of the prior determination since the record was not filed with the Court. In the *Leviner* case, the Court of Appeals remanded to the District Court with instructions to review the record for possible error on the face of the evidence.

4. The District Court has jurisdiction under Section 205(g) to review the Secretary's final determination on the merits for error on the face of the evidence at any time.

In pertinent part, Section 205(g) of the Act reads as follows: "Any individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision *or within such further time as the Secretary may allow. . . .*" (Emphasis supplied.) As above noted, the Secretary's own regulations allow for a reopening at any time for the purpose of correcting error on the face of the evidence. 20 CDR 404.957-C-8.

It is thus apparent that the claimant may obtain full review of the Secretary's final determination on the merits if he commences a civil action within sixty days thereof, and that the claimant can obtain limited review thereafter by filing a civil action alleging error on the face of the evidence but only to ascertain the presence of such error on the face of the evidence. By his regulations, the Secretary has extended the sixty-day period in which a claimant may file a civil action to review the decision for the limited purpose above indicated.

Under this view, the literal requirement of a hearing in Section 205(g) is satisfied because the decision under scrutiny is the final determination of the Secretary on the merits which indeed involves a hearing. Otherwise stated, the matter under review is not the Secretary's decision refusing to reopen the initial determination but rather the initial determination itself is sought to be reviewed but only for the limited purpose of ascertaining error on the face of the evidence.

Although this position was not urged or briefed below, and although no precedent is cited wherein this specific argument was advanced, it appears a perfectly reasonable construction of the statute and the regulation. It may very well be the underlying rationale of the cases cited above emanating from the 4th and the 8th Circuits. Indeed, the leading case of *Grose v. Cohen, supra*, prefaces its remarks by observing, "ordinarily an administrative decision becomes final unless a civil action is filed in the District Court within sixty days. Section 205(g) of the Act . . . under the doctrine of res judicata the final decision may become the basis of denying subsequent applications." *Grose* then goes on to pronounce its error-on-the-face-of-the-evidence exception to the res judicata doctrine.

This construction of Section 205(g) would further resolve the potential dilemma facing the Courts which obviously are bent upon finding a basis of jurisdiction to review reopening petitions on one theory or another. This is not surprising, since the Courts should be ever mindful of the humane purposes of the Social Security Act. In numerous instances, as here, the applicant is uneducated and without counsel at the stage when his 205(g) right to review runs its sixty-day course. In *Gold v. Secretary, Health, Education and Welfare* the Court stated: "Hearings under the SSA are non-adversary." *Gold v. Secretary, Health, Education and Welfare*, 463 F.2d at page 43 (2nd Cir. 1972). To allow review would be more in keeping with the purposes of the SSA then to disallow it.

II.

TO ALLOW REVIEW OF REOPENING PETITIONS WILL NOT RESULT IN A PLETHORA OF RELITIGATION OF OLD CLAIMS.

The Secretary argues that to allow review of Reopening Petitions would ". . . burden the Courts with repetitive efforts to review stale claims. . . ." Petitioner's Brief, page 19. This contention is untenable. Under the APA review is permitted only for the limited question of whether the Secretary abused his discretion in disallowing the Reopening Petition. In review of decisions on the basis of error on the face of the evidence the Court would be limited to consideration of that narrow issue. As error on the face of the evidence is defined (Claims Manual Section 7015) it is to be hoped that instances where such error is present would be

rare. Likewise it is to be hoped that the Secretary would rarely abuse his discretion.

There could be no "repetitive" litigation because once the reviewing Court passes upon the narrow issue of abuse of discretion or of error on the face of the evidence the Court's decision would constitute judicial res judicata.

Amicus Curiae compiles all cases of Reopening Petitions since *Cappadora* was decided in 1966. See Brief of Amicus Curiae Appendix p. 1a-4a. The extent of such litigation is relatively slight.

Being mindful of this potential objection, the Court in *Cappadora v. Celebrezze, supra*, observed that ". . . a review of refusals to reopen, necessarily limited to abuse of discretion, would impose a relatively slight burden on the agency and the Courts. . . ." *Cappadora v. Celebrezze, supra*, 356 F.2d at page 5.

III.

THE ADMINISTRATIVE PROCEDURE ACT IS AN INDEPENDENT GRANT OF JURISDICTION.

(Respondent Sanders here adopts the arguments on this issue as set forth in Part III of the learned Brief of Amicus Curiae, Administrative Law Center at pp. 27-48 thereof.)

CONCLUSION

The District Court possesses jurisdiction to review Social Security Reopening Petitions. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 8 1977
MICHAEL RODAK, JR., CLERK

No. 75-1443

In the Supreme Court of the United States

OCTOBER TERM, 1976

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

MISTER SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Both respondent (Br. 13-14, 18-20) and *amicus* (Br. 5-20) contend that Section 205(g) of the Social Security Act, as amended, 42 U.S.C. 405(g), affirmatively grants the federal district courts jurisdiction to entertain suits to review the Secretary's refusal to reopen final administrative decisions.

a. In relying upon Section 205(g), respondent candidly admits being "at odds" with the case law (Br. 13).[1] As respondent acknowledges (Br. 13), the courts of appeals

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[1]All of the numerous courts of appeals that have passed upon this issue have agreed that jurisdiction over the Secretary's denials of reopening petitions cannot be based on the Social Security Act. See p. 16 of our opening brief. The court below subscribed fully to that proposition and thought it too clear for argument (Pet. App. A, p. 5a).

are in agreement "that Section 205(g) is not the jurisdictional basis for * * * review because the literal requirements of a 'final decision made after a hearing' are absent * * *." But, respondent argues, in *Weinberger* v. *Salfi*, 422 U.S. 749, and *Mathews* v. *Eldridge*, 424 U.S. 319, this Court discarded the statute's literal requirements. Similarly, *amicus* argues (Br. 5-10) that the requirement of a "final decision after a hearing" has in practical effect been erased. Both positions fly in the face of the plain statutory language and find no support in the cases relied upon.

In *Salfi* and *Eldridge*, the substantive questions presented for review concerned the constitutional validity of standards and procedures imposed by the Social Security Act. Questions of that type are unsuited to determination through administrative hearing procedures, and this Court held that in such special circumstances the requirement of a hearing could be waived. But in the ordinary case, and this is one, involving nothing more than the application of an unchallenged statutory or regulatory standard to the evidence of record, the statutory requirement of a "final decision made after a hearing," together with the 60-day statute of limitations, serves the important function of weeding out both stale and premature claims. As a matter of judicial economy it should not be ignored, and as a matter of statutory construction it cannot be.

To ignore the required statutory procedure in cases such as this would frustrate the congressional purpose implicit in the 60-day statute of limitations. If a broad scope of review were exercised over denial of reopening, by the simple expedient of requesting reopening a claimant could in effect restart the running of his 60 days. Respondent suggests that upon review of a refusal to reopen, a claimant would be entitled only to "limited review," which will be undertaken for "the limited purpose of ascertaining error on the face of the

evidence" (Br. 19).[2] But respondent does not explain how such review would differ from a review of the Secretary's final decision denying benefits, where the question is whether the findings are supported by substantial evidence. Acceptance of respondent's position, therefore, might create a second entry path to the courts to review the merits of the original claim for benefits, one without any guide as to procedure or limits as to time.

b. Respondent alternatively contends (Br. 13-14; see also *Amicus* Br. 10-20) that a petition for reopening presents an application "for payment under" the Social Security Act and therefore requires both a hearing within the meaning of Section 205(b) and judicial consideration under Section 205(g). But Section 205(b) does not mandate a hearing on the mere filing of an application for payment. Rather, it calls for a hearing, after preliminary review and a timely appeal therefrom, "to make findings of fact and decisions as to the rights of" the applicant. Once the Secretary has complied by making the factual determination and thereupon rendering a decision as to the rights of the individual—his final decision made after a hearing—he is not required to do it again, upon a request for rehearing or reopening.[3]

The contrary view urged by respondent and *amicus* would impose upon the Secretary the burden of conducting a potentially endless series of hearings with regard to each claimant, and upon the courts the correlative burden of hearing a potentially endless series of actions.[4] The cost to

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[2]In the present case, we are not informed what kind of error respondent alleges.

[3]Indeed, the statute itself does not provide any reopening procedure—the opportunity to reopen final decisions is afforded by the Secretary's regulations—and therefore Congress plainly did not contemplate a hearing requirement with respect to such procedure.

[4]Alternatively, the Secretary would be forced to revoke his regulations establishing a procedure for reopening.

society in potential disruption of both the agency's and the courts' administration would far outweigh the benefit in arguably more informed decision-making with respect to requests for reopening. Cf. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 348. Respondent and *amicus* cite no case law or legislative history that directly supports their novel theory, and neither the language nor the purpose of Section 205(b) will sustain the reading they urge.

2. Respondent contends (Br. 3-12; see also *Amicus* Br. 21-27) that even if jurisdiction is not affirmatively granted by Section 205(g), it is not precluded by Section 205(h).[5] But as written, and as this Court has interpreted its words, Section 205(h) means that only those decisions of the Secretary that satisfy the requisites of Section 205(g) are eligible for court review; all others are precluded. The second sentence of Section 205(h) explicitly states that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided," *i.e.*, except as provided in Section 205(g). This Court has confirmed that this provision "prevent[s] review of decisions of the Secretary save as provided in * * * §[2]05(g)." *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757. Since it is not controverted that respondent seeks review of a "decision of the Secretary," it is manifest that his suit is barred by the second sentence of Section 205(h) if, as we have argued, it is not cognizable under Section 205(g).

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[5]Of course, even if there is not a total preclusion of jurisdiction there still must exist a specific source of jurisdictional authority or the federal courts cannot act in the case. Although some courts have upheld jurisdiction in cases like this without discussing its basis, they doubtless were relying on one or another of the statutes invoked here. For that reason, we do not linger over respondent's invocation of the "inherent power" (Br. 14-18) of the district court to take jurisdiction in this type of case.

Following *Cappadora* v. *Celebrezze*, 356 F. 2d 1 (C.A. 2), respondent and *amicus* suggest that the language quoted above from Section 205(h) should be read as applying only to those findings and decisions of the Secretary with respect to which jurisdiction to review is conferred by Section 205(g), *i.e.*, as precluding nonstatutory review only of final decisions made after a hearing, with respect to which statutory review already is provided. But that argument runs counter to both the plain statutory language, which covers not just final decisions but all findings and decisions of the Secretary, and common sense as well. For example, Congress could not have intended by one and the same provision both to restrict the courts' jurisdiction over the Secretary's final decisions and at the same time to open up to unfettered judicial congnizance the Secretary's interim decisions, made before a hearing. To the contrary, Congress intended to, and did, bar court intervention in all the Secretary's decisions that did not fall within the particular provisions in favor of final decisions made after a hearing.

Amicus suggests (Br. 25) that the *Cappadora* reading nevertheless is required to prevent the second sentence of Section 205(h), quoted above, from making the third sentence redundant. (The third sentence reads: "No action against the United States, the Secretary, or an officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.") There is no danger of redundancy. Whereas the second sentence of Section 205(h) pertains only to the review of findings of fact or decisions of the Secretary, the third sentence sweeps broadly to bar suits where the Secretary has not yet acted or no administrative claim has been filed. *Amicus* simply overlooks the entire thrust of Section 205(h): the third sentence forces the claimant to pursue his

administrative remedies, and the second sentence forces him to exhaust those remedies, before a suit on his claim becomes judicially cognizable.[6]

3. Our contention that Section 10 of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, does not itself confer jurisdiction on the district courts[7] received after-the-fact confirmation with the enactment on October 21, 1976, of Pub. L. 94-574, 90 Stat. 2721.[8] That statute abolishes the

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[6]Since the second sentence of Section 205(h), pertaining to situations such as here where the Secretary has made findings of fact or a decision, explicitly bars review of this case, the Court need not reach *amicus'* contention (Br. 22-23) that the third sentence of Section 205(h), standing alone, would not preclude jurisdiction under statutes other than those comprehended within 28 U.S.C. (1946 ed.) 41. That contention is relevant only to situations where the second sentence does not apply, *i.e.*, to situations where suit is brought without awaiting a finding or decision by the Secretary. It is not relevant here. In any event, *amicus'* contention fails for the reasons stated at pages 12-16 of our opening brief and at pages 17-18 of the Secretary's brief in *Norton* v. *Mathews*, No. 74-6212, decided June 29, 1976. (We are furnishing respondent with a copy of the latter brief.)

[7]Of course, the Court need not reach this issue if it concludes, as we contend, that Section 205(h) of the Social Security Act precludes judicial review of the Secretary's refusal to reopen. See 5 U.S.C. 701(a)(1).

[8]Pub. L. 94-574 is reprinted in the Appendix, *infra*. A main provision of that statute eliminates the defense of sovereign immunity in suits against the United States involving agency action and seeking relief other than money damages. This is done by an amendment to Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702, but the amendment makes clear that the removal of the immunity defense does not displace statutes that otherwise bar the review of particular agency action: "Nothing herein * * * confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

The legislative history of Pub. L. 94-574 also makes clear that other "legal or equitable" grounds of defense to suits challenging agency action are left intact, including the grounds that the "action [was] committed to agency discretion," and that there was "express or implied preclusion of judicial review * * *." S. Rep. No. 94-996, 94th Cong., 2d Sess. 11 (1976); H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 12 (1976).

amount-in-controversy limitation of 28 U.S.C. 1331 in actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Since the amount-in-controversy requirement had not served to deprive the district courts of jurisdiction to hear ordinary money claims against the United States in cases involving less than $10,000 (see 28 U.S.C. 1346(a)), the manifest purpose of Pub. L. 94-574 is to enlarge jurisdiction to hear suits, not cognizable as money claims against the United States, arising out of administrative decision making, *i.e.*, to enlarge jurisdiction to review agency action. The legislative history confirms this. Enactment was motivated by the consideration that "[t]he amount in controversy requirement in subsection (a) of section 1331 of title 28 prevents an otherwise competent United States district court from hearing certain cases seeking 'non-statutory' review of Federal administrative action." H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 13. (1976). See also S. Rep. No. 94-996, 94th Cong., 2d Sess. 12 (1976).

If, as respondent argues, the APA itself confers jurisdiction to review agency action, the new statute would have been largely or entirely unnecessary. But Congress clearly was of the view that it had not conferred jurisdiction in the APA. Congress acted because "there are a significant number of situations involving 'nonstatutory' review in which a plaintiff must still ground his action on Section 1331 * * *." S. Rep. No. 94-996, *supra*, at 13; H.R. Rep. No. 94-1656, *supra*, at 14.

Undoubtedly, the chief reason why some courts have allowed themselves to be persuaded that the APA affords an independent basis for jurisdiction has been the effect of the $10,000 amount-in-controversy requirement in 28 U.S.C. 1331. Individuals seeking to vindicate rights against agencies or other government officials when those rights carried no dollar-and-cents valuation long pressed the

courts to read the APA as a jurisdictional statute because it contains no amount-in-controversy limitation on jurisdiction. In Pub. L. 94-574, Congress has afforded relief to such individuals, but in a manner that leaves no doubt of its disapproval of prior judicial decisions "avoiding or circumventing" the former jurisdictional bar. See S. Rep. No. 94-996, *supra*, at 16; H.R. Rep. No. 94-1656, *supra*, at 16-17. "Such avoidance," both Committees noted, "abdicates a court's constitutional and statutory duties 'to insure that each case before it falls within the limited jurisdictional power of the federal judiciary * * *'." *Id.* at n. 51.

Thus Pub. L. 94-574 and its legislative history establish beyond serious doubt that Congress regards 28 U.S.C. 1331, not the APA, as the jurisdictional provision governing nonstatutory judicial review of agency action.[9] Since Section 205(h) of the Social Security Act explicitly bars consideration of social security claims under 28 U.S.C. 1331 (see pages 5-6 and note 6, *supra*), the courts lack jurisdiction to grant such review here.

For the reasons stated above and in our opeing brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

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[9]In addition, actions of certain agencies have been held to be reviewable under 28 U.S.C. 1337, which confers jurisdiction on the district courts over civil actions arising from commerce and antitrust regulations.

DOJ-1977-01

APPENDIX

Public Law 94-574
94th Congress

90 STAT. 2721

An Act

To amend chapter 7, title 5, United States Code, with respect to procedure for judicial review of certain administrative agency action, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 702 and 703 of title 5, United States Code, are amended to read as follows:

"§ 702. Right of review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

"§ 703. Form and venue of proceeding

"The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement".

SEC. 2. Section 1331(a) of title 28, United States Code, is amended by striking the final period and inserting a comma and adding thereafter the following: "except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

SEC. 3. The first paragraph of section 1391(e) of title 28, United States Code, is amended to read as follows:

"(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.".

Approved October 21, 1976.

Supreme Court, U. S.
FILED
OCT 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1443

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Petitioner,

v.

MISTER SANDERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1976

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Petitioner,

v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE ADMINISTRATIVE LAW CENTER, LEGAL AID BUREAU, INC., BALTIMORE, MARYLAND

INTEREST OF AMICUS CURIAE

Amicus, Administrative Law Center of the Legal Aid Bureau of Baltimore, is interested in this case since the decision of the Court will have an impact on the clients amicus represents. Amicus as a Legal Services program has represented hundreds of low income persons in Maryland in disability cases under Titles II and XVI of the Social Security Act. Many of these indigent clients have problems with reopening claims which were initiated and became final before they obtained counsel to assist them. Access to judicial review to control and contain administrative discretion is an important

safeguard for these individuals and amicus urges affirmance of the decision of the court below.

Both parties have consented to the filing of this brief and copies of the letters of consent have been filed with the clerk pursuant to Rule 42 (2).

SUMMARY OF ARGUMENT

There are two routes by which this Court can find that the District Court has jurisdiction to review the final decision of the Secretary of Health, Education and Welfare refusing to reopen a previously denied claim for Social Security disability benefits. The first is through the statutory judicial review provision of the Social Security Act contained in Section 205(g) of the Act, 42 U.S.C. § 405 (g). The second route, necessary to pursue only if the first is rejected, is through Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

A. Section 205(g) of the Act, 42 U.S.C. §405(g), is the usual route by which a final decision of the Secretary is appealed to the United States District Court. Section 205(g) allows for a review of "any final decision of the Secretary made after a hearing. . . ." The Secretary alleges that Sanders can not satisfy the requirements of Section 205(g) because the decision appealed is neither "final" nor one made "after a hearing." However, on the issue of reopening his previous claim, Sanders received the most administratively final decision the Secretary would allow him to obtain. Sanders presented his claim for reopening to each level of agency adjudication.

The Secretary has been allowed to consider the claim for reopening completely and has issued a final decision on the issue from his Appeals Council, the agency's highest adjudicatory body. Sanders has clearly obtained a "final decision" within the meaning of Section 205(g).

The only question then is whether or not the decision was one "made after a hearing" as is required by the language of Section 205(g). This Court's decisions in *Mathews v. Diaz,* U.S. , 96 S. Ct. 1883 (1976); *Mathews v. Eldridge,* 424 U.S. 319 (1976) and *Weinberger v. Salfi,* 422 U.S. 749 (1975) have shown that the "after the hearing" requirement has not been literally construed to mandate an actual hearing held as a prerequisite to a lower court's exercise of Section 205(g) jurisdiction. Rather, the requirement can be satisfied by a demonstration that the claim for benefits has been fully presented to the Secretary and denied. Sanders clearly presented his claim for reopening to the Secretary and was finally denied. He asked for a hearing and failed to have one only because the Secretary denied it to him. In the context of these facts, the Court should hold that Sanders, having satisifed the Section 205(g) prerequisites to the best of his ability, is entitled to invoke it as a jurisdictional base to have his claim for reopening reviewed by a District Court.

The Secretary despite *Diaz, Eldridge* and *Salfi* still persists in his assertion that a hearing in the literal sense must precede the request for judicial review. Even were this the case, Sanders was entitled under Section 205(b) of the Act, 42 U.S.C. §405(b), to a hearing on the claim to reopen since it is a decision "as to the rights of any individual applying for a payment. . . ." Only the Secretary's unlawful denial of a hearing prevented Sanders from actually receiving the hearing which is his entitlement. Even under the Secretary's erroneous view of the "after a hearing" requirement, Sanders would be entitled to judicial review since he was entitled to a hearing by statute.

The Secretary's regulations, the purposes of the Act and the legislative history of Section 205 lend support

to Sanders' entitlement to a hearing and judicial review on his claim to reopen.

B. Since there is review available within the statutory framework, the Court need not reach the issue of the Administrative Procedure Act as a basis for jurisdiction. However, if the Court found it necessary to reach this issue, jurisdiction for a District Court to review a final decision of the Secretary of H.E.W. is available within Section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706.

Initially, there is no bar within the Social Security Act which would preclude review under the APA of a final agency decision that is not reviewable under Section 205(g). Although Section 205(h) of the Act, 42 U.S.C. §405(h), does impose limits on the authority of federal district courts to entertain lawsuits involving the Social Security Act, this section does not include the APA within the prohibited sources of jurisdiction. Further, the limitations of Section 205(h) are applicable only to the extent that the decision sought to be reversed is otherwise reviewable under Section 205(g). Where Section 205(g) is not otherwise available to review the final decision in issue, then the restrictions of Section 205(h) cannot operate to strip the district courts of properly invoked jurisdictional grants such as the APA.

A close analysis of the APA and its legislative history demonstrates that Congress intended to establish an independent grant of jurisdiction within the APA. This Court has, in fact, decided several cases which presume that the APA is jurisdictional. These cases were correctly decided and fulfilled the intent of Congress and the draftors of the Administrative Procedure Act to provide for judicial review of final agency action.

ARGUMENT

I.

A FINAL DECISION OF THE SECRETARY NOT TO REOPEN A CLAIM FOR BENEFITS UNDER TITLE II OF THE SOCIAL SECURITY ACT IS REVIEWABLE BY A UNITED STATES DISTRICT COURT PURSUANT TO SECTION 205(g) OF THE ACT.

The Secretary of Health, Education and Welfare has asked this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit that his decision to deny respondent Sanders' request to reopen a 1966 claim for Social Security disability benefits is subject to judicial review under Section 10 of the Administrative Procedure Act, 5 U.S.C. §701, *et seq.* (hereafter the "APA"). But the validity of the Appeals Court's decision to base its finding on reviewability on the APA need be reached by this Court only if Section 205(g) of the Social Security Act itself, 42 U.S.C. §405(g), did not confer jurisdiction on the district court to "affirm, reverse or modify" the Secretary's final determination not to reopen respondent's claim. *Mathews v. Eldridge*, 424 U.S. 319, 332 n. 12 (1976). Both the decisions of this Court and the administrative review process adopted by the Secretary demonstrate that the Social Security Act did confer such jurisdiction on the district court.

A. *The right of a claimant to an administrative hearing on the question over which judicial review is sought is not a prerequisite to a proper assertion of Section 205(g) jurisdiction.*

The Court of Appeals assumed, without elaboration, that Section 205(g) could not serve as a jurisdictional basis for review of the Secretary's decision not to reopen respondent Sanders' 1966 disability claim. (Pet. App. A, p. 5a). This assumption has been the starting point for the federal courts' analysis of Social Security reopening

cases, at least since the decision of the Ninth Circuit in *Filice v. Celebrezze*, 319 F.2d 443 (9th Cir. 1963). In *Filice*, the Ninth Circuit construed Section 205(g) to provide for judicial review only of decisions which follow upon an offer to a claimant of the opportunity for a hearing required by Section 205(b) of the Social Security Act, 42 U.S.C. §405(b), in cases involving "the rights of individuals applying for payment." *Id.* Section 205(b) provides, in relevant part, that:

> "The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual . . . he shall give such applicant . . . reasonable notice and opportunity for a hearing with respect to such decision."

Section 205(g), in turn, offers the following remedy to a claimant who disagrees with the disposition of his claim:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action. . . ."

Combining the language of the two subsections, the Ninth Circuit found that:

> ". . . [T]he orders made judicially reviewable by Subsection (g) of Section 405 [§205(g) of the Act] are orders authorized by Subsection (b) of Section 405 which make findings of fact and decisions as to rights of applicants for payment, or which affirm, modify, or reverse such orders, and not orders which merely deny petitions to reopen proceedings in which such findings and decisions have been made." *Filice v. Celebrezze, supra*, 319 F.2d at 445-446.

In piecing together this construction of Section 205, the *Filice* court relied heavily on the holding of this Court six years earlier in *Securities and Exchange Commission v. Louisiana Public Service Commission*, 353 U.S. 368 (1957). In *Louisiana Public*, the Louisiana Public Service Commission filed a petition with the S.E.C. to reopen a final order made under the Public Utility Holding Company Act of 1935 which had resulted in an order to a local power company to divest itself of all non-electric assets. The S.E.C. denied the Commission's petition to reopen and the Commission then sought judicial review claiming that the statute gave it the right to such review. However, the particular statute in question provided for review only of the directory orders of the S.E.C. which actually revoked or modified an order previously made. Since the S.E.C. had not in fact revoked or modified its previous order, but merely denied a request that it do so, this Court held that the denial did not fit the specific words of the statute and that judicial review therefore could not be had under that statute which was found to be unambiguous. The Court's resolution of *Louisiana Public* rested specifically on the particular statutory language before it and not on any general proposition that agency decisions not to reopen earlier determinations are in principle unreviewable. *Louisiana Public* thus in no way undercuts the relevance, in Social Security reopening cases, of the language and history of the Social Security Act, and especially, of the decisions of this Court elaborating that language and history, most of which were not available to the *Filice* court.

In several recent decisions, this Court has had occasion to address the scope and nature of judicial review under Section 205(g) in some detail. The teaching of these decisions, *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Mathews v. Diaz*, U.S. , 96

S. Ct. 1883 (1976); *Norton v. Mathews,* U.S. , 96 S. Ct. 2771 (1976), and especially *Mathews v. Eldridge, supra,* is that Section 205(g) established a substantially more inclusive scheme of judicial review than was assumed by the Ninth Circuit in *Filice. Mathews v. Eldridge* presented a constitutional challenge to the Secretary's practice of terminating Social Security disability benefits without affording the affected recipient an opportunity for a prior oral hearing. This Court held that jurisdiction to hear such a challenge was conferred by Section 205(g), notwithstanding the fact that no administrative hearing was held on the question of the recipient's continued entitlement to disability benefits and none was even available with respect to his constitutional claim. This holding was based on the court's analysis of the prerequisites of Section 205(g) jurisdiction as consisting of two elements, one "waivable" by the Secretary, and the other indispensable to an assertion of jurisdiction, regardless of the Secretary's treatment of the claim over which review is sought. 424 U.S. at 328.

The indispensable, or non-waivable, element was a "requirement that a claim for benefits [be] presented to the Secretary." *Id.* The purpose of this requirement was the traditional one of assuring that the head of an administrative agency have an opportunity to issue "some decision" to a claimant before litigation is commenced. *Id.* Satisfaction of this purpose, however, did not require that this decision be rendered "after a hearing," the language of Section 205(g) notwithstanding. Nor, the Court made clear, did it require that the issue presented for judicial review be one which a claimant was entitled to carry to an administrative hearing. Though an aggrieved claimant could theoretically contend, at a hearing convened to review the determination that his disability had ceased, that the

failure to afford him a pretermination hearing was unconstitutional, it was "unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. *The Secretary would not be required even to consider such a challenge.*" 424 U.S. at 330 (emphasis added).

Thus, it is evident that the "jurisdictional" precondition to Section 405(g) review, 424 U.S. at 328, is simply the presentation of a claim for benefits to the Secretary. The claim presented need not proceed to any administrative hearing nor need it be the sort of claim for which the Secretary is required to provide administrative review. Respondent Sanders' request for judicial review of the Secretary's refusal to reopen his 1966 claim for disability benefits therefore satisfies the non-waivable element of Section 205(g) jurisdiction; he has presented an application to reopen to the Secretary and the Secretary has denied that application. The Secretary's refusal to afford respondent a hearing on his claim, even if such refusal is authorized by the Social Security Act, did not defeat the authority of the district court to affirm, reverse, or modify that denial.

The waivable element of Section 205(g), the general requirement that "the administrative remedies prescribed by the Secretary be exhausted," 424 U.S. at 328, is in no way brought into issue by respondent Sanders' claim. The Secretary does not dispute that respondent fully pursued every step in the Social Security administrative appeals process that was made available to him. Following the initial denial of his application to reopen, respondent first unsuccessfully sought reconsideration pursuant to 20 C.F.R. §404.909. He then requested a hearing pursuant to 20 C.F.R. §404.917 and asked to

appear in person before the administrative law judge. He failed to advance his claim any further through the hearing and Appeals Council stages of the appeals process only because the administrative law judge denied his request and instead dismissed his claim. He even asked that the Appeals Council review the dismissal, but that request likewise was refused. It is thus evident that if respondent failed to "exhaust the full set of internal review procedures provided by the Secretary," he did so only because the Secretary would not open those processes to him. Under these circumstances, respondent must be said to have received the most "final" decision on his reopening claim that the Secretary was willing to provide. There can therefore be no serious argument that he has not complied with the "waivable" exhaustion prerequisite to a proper assertion of Section 205(g) jurisdiction.

Respondent Sanders' claim to reopen his unsuccessful 1966 application for disability benefits thus satisfies both elements of Section 205(g) jurisdiction outlined by this Court in *Mathews v. Eldridge, supra.* And it is satisifaction of these elements, rather than any superficial similarity to *Louisiana Public, supra,* that is dispositive of respondent's entitlement to judicial review of the Secretary's denial of that claim.

B. *Respondent's reopening claim is an application "for a payment under" the Social Security Act, within the meaning of Section 205(b) of the Act, and is therefore entitled to a hearing pursuant to that section and to judicial review pursuant to Section 205(g).*

This court's analysis in *Mathews v. Eldridge, supra,* makes clear that even if the Social Security Act authorized the Secretary to issue a "final decision" denying respondent's reopening claim without affording him a hearing on that claim that final decision is

nonetheless reviewable under Section 205(g). But if the Act required the Secretary to offer a hearing to respondent, then his reopening claim is reviewable even within the *Filice* court's holding that "the orders made judicially reviewable by subsection (g) of Section 405 are orders authorized by subsection (b) of Section 405 which make findings of fact and decisions as to rights of applicants for payment. . . ." 313 F.2d at 445. The *Filice* court assumed that orders denying applications to reopen previously denied claims were not "orders authorized by" Section 205(b). *Id.* But this assumption runs counter to the language, history and purpose of Section 205(b), and even to the Secretary's own interpretation of the Section, as reflected in the implementing regulations he has adopted.

1. *The Statutory Language*

Section 205(b) directs the Secretary to provide a hearing whenever a "decision as to the rights of an individual applying for a payment" is contested. The Secretary now asserts, Govt. Br. at 18, that his decision not to reopen respondent Sanders' 1966 claim for disability benefits is not such a decision and may therefore be disposed of summarily. It is significant, however, that the Secretary offers no support whatever for this assertion, but instead simply posits it as a proposition that is beyond argument. But when respondent filed his second application with the Social Security Administration in March, 1973, he was seeking disability benefits. His application was ultimately styled as a request to reopen his previously denied claim because he could become entitled to the benefits he sought only by reactivating that claim. Had respondent's application been treated as a new claim, it could not possibly have been successful since his insured status for disability benefit purposes had lapsed

by the time it was filed. If, on the other hand, respondent could demonstrate a right to reopen his 1966 claim under the standards for reopening set out in the Secretary's regulations, 20 C.F.R. §404.957, he would, if the reopened claim were then granted, be awarded benefits from the date of his entitlement under that claim through the present and would thereby achieve the objective of his second application — the payment of Social Security benefits on account of his disability. To secure such payment was always respondent's only goal. Reopening became the route to attainment of that goal. The Secretary's decision to close off that route thus has no significance except as "a decision as to the rights of an individual applying for a payment" of Social Security benefits.

2. *The Secretary's Implementing Regulations*

The structure of administrative review established by the Secretary to carry out the requirements of Section 205(b) offers persuasive evidence that the Secretary himself shares the foregoing perception of the reopening process. This structure, set out at 20 C.F.R. §404.901 *et seq.*, creates a four-tiered scheme for determination and review of the "rights of an individual applying for a payment" of benefits. The four steps in the scheme are an "Initial Determination" of the claimant's rights, an informal "Reconsideration," the hearing required by Section 205(b), and, finally, an internal appellate review by the Secretary's Appeals Council. The most critical step in this review process is the first one. For the only claims which are entitled to proceed through the four steps, including the hearing mandated by Section 205(b), are those which the Secretary preliminarily disposes of through the issuance of an "Initial Determination," 20 C.F.R. §404.917. It is thus clear that the Secretary has defined a

"decision as to the rights of any individual applying for a payment," as one which is provided in the form of an Initial Determination.

The types of claims which the Secretary has determined to be entitled to an Initial Determination are catalogued at 20 C.F.R. §404.905. Prominent among the claims appearing in this catalogue are any which urge an "entitlement to monthly benefits . . . under Title II of the Act." 20 C.F.R. §404.905(a). Respondent Sanders' 1973 claim seeking to reopen his 1966 application for disability benefits unquestionably did urge such entitlement within any reasonable construction of the word. Respondent claimed that his second application presented evidence which warranted reopening, under the standards set out at 20 C.F.R. §404.957 and that he was therefore entitled to benefits on the basis of his first application.

Any alternate, specialized construction which would exclude reopening requests from those claims which urge "entitlement to monthly benefits" must overcome not only this common understanding of that phrase but also the reasonable, if not compelling, inferences afforded by the remainder of the "Initial Determination" catalogue and by the Secretary's treatment of respondent's second application. Beyond claims of entitlement to monthly benefits, the Secretary's regulations require Initial Determinations to be issued in a dozen additional situations, 20 C.F.R. §404.905(b) - (n). Many of these situations involve claims of right which are, by comparison to a request to reopen a previous claim, far more tenuously linked to the application "for a payment" which is guaranteed a hearing by Section 205(b). Among these claims are, for example, a covered worker's request that his Social Security earnings record be revised, 20 C.F.R. §404.905(g), a benefit

recipient's request that the Secretary waive recovery of prior overpayments he has received, 20 C.F.R. §404.905(m), and a recipient's contention that appointment of a representative payee to manage his payments would not serve his best interests, 20 C.F.R. §404.905(n). It is extremely unlikely that the Secretary, as a rational administrator, would elect to provide Initial Determinations, and therefore hearings, to these classes of claims, but withhold them from claims alleging compliance with the reopening standards set out at 20 C.F.R. §404.957, claims which far more directly pertain to "the rights of an individual *applying* for a payment." 42 U.S.C. §405(b) (emphasis supplied).

The Secretary has, of course, had ample opportunity directly to seek to exclude reopening cases from access to his appeals process. A list of decisions which are explicitly *not* "Initial Determinations" and, therefore, not in the Secretary's view entitled to review through a Section 205(b) hearing, is set forth at 20 C.F.R. §404.906. Conspicuously absent from this list is any reference to a decision on an application to reopen a previously denied claim. When the Secretary has promulgated a regulation which he uses exclusively to communicate the limitations he has elected to place on access to administrative review, classes of claims which do not appear in that regulation should not be presumed, *sub silentio*, to be subject to its exclusionary effect.

Persuasive evidence that the Secretary has not sought to exclude reopening cases from full administrative review, including a Section 205(b) hearing, emerges from the initial stages of his treatment of respondent's effort to reopen his 1966 claim. If requests to reopen were not entitled to a hearing, it could be safely anticipated, given the Secretary's regulatory scheme, that respondent's request would not have merited an Initial Determination. But respondent did receive not

only an Initial Determination but also a "Reconsideration," the second of the four decisions available from the Secretary's appeals process. Receipt of these two decisions entitled respondent to a hearing on the question whether his claim met the regulatory standards for reopening. 20 C.F.R. §404.917. But at the hearing step in the appeals process, the review structure prescribed by the Secretary was inexplicably abandoned. Instead of providing respondent with a hearing on his reopening claim, the administrative law judge, without citing authority for his action, summarily rejected that claim. This summary rejection of respondent's request to reopen enabled the law judge erroneously to characterize the claim before him as nothing more than a revival of respondent's first application, finally denied in 1966, and thereby to dismiss it under the doctrine of administrative *res judicata*. 20 C.F.R. §404.937(a). The summary resolution ultimately accorded respondent's reopening application is clearly inconsistent with the disposition it received at the lower levels of the appeals process. This earlier disposition, through the issuance of Initial and Reconsideration Determinations, could serve as the basis for a *res judicata* dismissal only after a hearing at which respondent's application was found not to satisfy the criteria for reopening set out at 20 C.F.R. §404.957.

In sum, the administrative review scheme established by the Secretary to carry out Section 205(b), as exemplified by the catalogue of Initial Determinations, the classes of claims excluded from that catalogue and the treatment of respondent's reopening claim itself, provides for full administrative review, including an offer of a hearing, of applications to reopen previously denied claims. The Secretary's failure to afford such review to respondent's claim amounted to a violation of his own rules.

3. *The Purposes of the Social Security Act*

The objectives and policy behind the disability insurance program under Title II of the Social Security Act are best served by providing for liberal judicial review of the Secretary's final adverse decisions.

When Congress created the original program of old age and survivors benefits, the purpose was to provide payments which would

> ". . . save men and women from the rigors of the poor house as well as from the haunting fear that such a lot waits them when journey's end is near." *Helvering v. Davis*, 301 U.S. 619, 641 (1937). *See also, Social Security Board v. Nierotko*, 327 U.S. 358 (1946).

When the disability program for younger workers (under 50) was established in 1960[1] the policy and objectives were similar:

> "The need of younger disabled workers and their families for disability protection is, in some respects, greater than that of older workers. They are more likely to have families dependent upon them than is the case with respect to workers aged 50 and over. Many who would be eligible for disability benefits except for the age limitation are now receiving payments under the public assistance programs. With insurance benefits available to them and their dependents, some of these individuals would be no longer in need of assistance payments." H.R. Rep. No. 1799, 86th Cong., 1st Sess. 12.

Congress' primary policy objective was to establish a system to provide for the general welfare of aged or disabled individuals. The already established statutory

[1] A detailed description of the entire legislative development of the Title II disability program from 1935-1974 is included in the "Committee Staff Report on the Disability Insurance Program," Staff of the House Committee on Ways and Means, pp. 107-124 (July, 1974).

hearing procedure, §205(b), and the judicial review mechanism, §205(g), were means to implement the remedial goal, not ends in themselves. Congress clearly wanted an adjudication scheme geared to the unrepresented claimant, informal in nature and liberal in operation. *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971). Obviously, a summary application of *res judicata* principles to such claimants would not implement the spirit of the Act and would result in frustration of its remedial purposes. *See, Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969).

These objectives have of course been advanced by the reopening procedures the Secretary has established. But the availability of judicial review over denial of reopening requests advances these objectives even more since it insures a dissatisfied claimant a completely independent forum to test the agency's adverse decision. Judicial review would obviously make certain that the agency interprets its own regulations and the Act with sufficient liberality to accomplish the broad remedial purposes of the Social Security system, which are to provide benefits to those entitled to receive them and thereby to relieve the states from the support of such individuals and their families. In addition, most disability claimants are poorly educated[2] and appear unrepresented at hearings the first time their claims are considered.[3] They face a complex administrative

[2] F. Kaufman, "District Court Review of Department of Health, Education and Welfare Decisions," 26 Administrative Law Review 113, 114 (1974); J. Smith, "Social Security Appeals in Disability Cases," 28 Administrative Law Review 13, 14 (1975) [hereinafter cited as Smith].

[3] Attorneys appear in only one out of five hearings before Administrative Law Judges, Smith, p. 14, but when a claimant has an attorney his rate of success is three times greater than for those claimants who are unrepresented. See, Report of the Disability Claims Process Task Force, p. 36,

scheme with a multitude of regulations and requirements. The foregoing objectives can be best fulfilled by allowing liberal provision for reopening and by insuring that conventional judicial review is available to assure that decisions on reopening requests emerging from this scheme are supported by substantial evidence. *Cf. Universal Camera Corp. v. National Labor Rel. Bd.*, 340 U.S. 474, 490 (1951).

4. *Legislative History of Section 205*

The legislative history of §205(g) arises from the Social Security Act Amendments of 1939, 53 Stat. 1362, which inserted most of the procedural provisions of Title II into the Social Security Act. The 1939 Amendments evolved from the report and recommendations of the Advisory Council on Social Security and the recommendations of the Social Security Board. The Advisory Council was silent on procedural matters; but the Board proposed to Congress that findings of fact and decisions of the Board should be final and conclusive in the manner of the World War Veterans Act and other legislation which dealt with the handling of a large number of claims. Report of the Social Security Board, Proposed Changes in the Social Security Act, H.R. Doc. 110, 76th Cong., 1st Sess. (1939).

The House Ways and Means Committee held hearings on all of the proposals from February to April, 1939,[4] but no mention was made at the hearings of the matter of judicial review of Title II claims. After the hearings, the House Ways and Means Committee met

100-102, reprinted in "Recent Studies Relevant to the Disability Hearings and Appeals Crisis," Subcommittee on Social Security, House Ways and Means Committee, 94th Cong., 1st Sess. (Comm. Print 1975).

[4] Hearings Relative to the Social Security Act Amendments of 1939 Before House Comm. on Ways and Means, 76th Cong., 1st Sess. (1939).

in executive sessions over a period of six weeks and produced the bill (H.R. 6635) which without relevant amendments became the bill enacted by both houses of Congress and signed by the President. The only significant references to the judicial review provisions are in the House and Senate Reports which are identical in content. The House report describes the procedural amendments:

> "This section of the bill provides a detailed procedure in connection with benefit determination and payment. Administrative and judicial review provisions not now provided in the Social Security Act are included and administrative provisions are included which are similar to those under which the Veterans' Administration operates." H.R. Rep. No. 728, 76th Cong., 1st Sess. 51 (hereinafter "House Report").

See also, S. Rep. No. 734, 76th Cong., 1st Sess. 51 (hereinafter "Senate Report"). A more detailed description of Section 205(g) follows in the House Report:

> "Section 205(g) provides that any individual may obtain a review of any final decision of the Board made after a hearing to which he was a party, by commencing a civil action. . . . The present provisions of the Social Security Act do not specify what remedy, if any, is open to a claimant in the event his claim to benefits is denied by the Board. The provisions of this subsection are similar to those made for the review of decisions of many administrative bodies." House Report, 43. *See also* Senate Report, 52.

In summarizing Section 205(b), the subsection which determines entitlement to a hearing, the House Report states:

> "Section 205(b) outlines the general functions of the Board in determining rights to benefits. It requires the Board to offer opportunity for a hearing, upon request, to an individual whose

rights are prejudiced by any decision of the Board." House Report, 42. *See also*, Senate Report, 51.

The legislative history is admittedly sparse. It reveals no direct congressional consideration of the problem of review of requests to reopen. *See, Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975). But the history clearly offers no indication that Congress sought to draft the very narrow grant of jurisdiction which the Secretary now ascribes to Section 205(g). It rather shows that Congress intended to provide a mechanism to allow for hearings and judicial review for any "individual whose rights are prejudiced by any decision of the Board." House Report, 42. This intention both supports and is advanced by a construction of Sections 205(b) and (g) to authorize both an administrative hearing and judicial review of the issue whether a claim to reopen a previously denied application meets the standards for such reopening set out in the Secretary's regulations.

Amicus submits, in sum, that the language of Section 205(b), the Secretary's administrative review procedures and the purposes and history of the Social Security Act show that a request to reopen is an application "for a payment under" the Act. Such a request is accordingly entitled to a hearing pursuant to Section 205(b) and thus to judicial review under Section 205(g).[5]

[5] An alternate method of reaching the same result is to view the claimant's right to reopen under the Secretary's regulation, 20 C.F.R. 404.957, as one of the "rights of any individual applying for a payment . . ." Section 205(b). This right to request a reopening survives beyond the original denial of benefits becoming final. The right is obviously not extinguished by the original application becoming final and, in fact, becomes meaningful only at that time. As a continuing and surviving right of an individual who once applied for a payment, it clearly fits the words of Section 205 (b) and thus entitles the claimant to a hearing on that issue.

II.

IF JUDICIAL REVIEW OF RESPONDENT'S REOPENING CLAIM IS NOT AVAILABLE THROUGH SECTION 205(g), REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §701-706, IS NOT PRECLUDED BY SECTION 205(h) OF THE SOCIAL SECURITY ACT.

Should this Court decide, contrary to the position advanced above by amicus, that jurisdiction to review respondent's application to reopen his 1966 claim for disability benefits is not conferred by Section 205(g) of the Social Security Act, it will hold, in effect, that Section 205(g) review is available only to a claim for which a Section 205(b) hearing must be provided and that a reopening application may be summarily disposed of without the offer of such a hearing. On this view of Section 205(g), it is plain that its companion provision, Section 205(h) of the Social Security Act, 42 U.S.C. §405(h), does not operate to bar review of reopening cases pursuant to the grant of jurisdiction provided by Section 10 of the Administrative Procedure Act, 5 U.S.C. §701-706 (hereafter the APA).

Amicus demonstrates, *infra*, that the APA confers an independent grant of subject matter jurisdiction on the United States district courts. Assuming this court does not hold otherwise, the issue before it becomes whether Section 205(h) contains language which precludes the exercise of that jurisdiction in reopening cases. Section 205(h) provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such a hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal or governmental agency except as herein provided. No action against the United States, the Secretary or any officer or employee thereof shall be brought under Section 41

of Title 28 to recover on any claim arising under this subchapter."

The second and third sentences of this paragraph obviously impose limits on the authority of federal district courts to entertain lawsuits involving the Social Security Act. This Court has recently had occasion to discuss the nature and scope of these limits, especially those prescribed by the third sentence. In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court construed the third sentence of Section 205(h) absolutely to preclude the assertion of jurisdiction under the general grant for "federal questions", 28 U.S.C. §1331, over any claim arising under Title II of the Social Security Act. The Secretary contends that the logic of this construction would equally bar a court from relying on the APA as a source of jurisdiction over any such claim. Govt. Br. at 13. The difficulty with this contention is that the restriction imposed by the third sentence of Section 205(h) applies by its terms only to those grants of jurisdiction contained in Section 41 of Title 28 of the United States Code. Section 1331 was, of course, one of these grants. The APA, however, was placed by Congress in Title 5 of the Code and thus outside the reach of the limiting language of Section 205(h). Since the court's analysis of jurisdiction in *Salfi, supra*, proceeded entirely from this language, it should not be held either directly or inferentially to apply to jurisdiction under the APA.

The omission of the APA from the sources of jurisdiction foreclosed by the third sentence of Section 205(h) cannot properly be regarded as merely technical or ascribed to congressional oversight. By enacting Section 205(h), Congress did not, as the Secretary implies, bar the applicability of all then extant grants of jurisdiction to the federal courts to all claims arising under the Social Security Act. Notably absent from the

sources of jurisdiction withdrawn by the third sentence was the mandamus power to compel a federal official to perform a clear, ministerial duty owed to any person. In 1939, when Section 205(h) was enacted, this power resided exclusively in the courts of the District of Columbia where it had developed as part of the common law of the nation's capital. *McIntire v. Wood,* 11 U.S. (7 Cranch.) 504 (1813); *Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838). The mandamus power had not been codified,[6] did not, therefore, appear in Section 41 of Title 28 and was consequently unaffected by the third sentence of Section 205(h). The mandamus power is the only source of federal jurisdiction other than the APA which specifically and exclusively provides for review of the actions of federal officials. Their common exclusion from the sweep of the generic restriction imposed by the third sentence of Section 205(h) is in this sense readily understandable. Congress sought to assure that questions involving the construction and effect of the Social Security Act would generally reach federal courts through the avenue provided by Section 205(g). But at the same time Congress did not wish thereby to exempt the Secretary from the judicial review available against federal officials generally, through the mandamus power and the APA, for breaches of duty and abuses of discretion when such breaches or abuses could not be reviewed and corrected pursuant to Section 205(g).

This understanding of Congress' design in imposing the restrictions contained in the third sentence of Section 205(h) draws additional support from the purposes which underlay the enactment of the APA. As

[6] The mandamus power was not codified until 1962 when, pursuant to the Mandamus and Venue Act, 76 Stat. 744, P.L. 87-748 (1962), all federal district courts were authorized to entertain suits in the nature of mandamus. This authorization was and continues to be reflected at 28 U.S.C. §1361.

amicus points out at pp. 35-37, *infra*, one of the most important of these purposes was to assure the availability of judicial review to persons aggrieved by federal agency decisions alleged to be lawless or arbitrary. Accomplishment of this purpose was considered by the framers of the APA to require an expansion of the subject matter jurisdiction of the federal district courts. Nothing in the language or history of the APA indicates that this establishment of a new jurisdictional source to accomplish new remedial purposes was foreclosed to persons affected by arbitrary actions at the hands of the Social Security Administration.

The availability of APA jurisdiction is explicitly left unaffected by the language of the third sentence of Section 205(h). On this basis alone, this language must be read as having no bearing on the question whether the APA confers jurisdiction over respondent's reopening claim. But in addition the omission of the APA from the restrictive reach of the third sentence cannot properly be viewed as accidental. Rather, it forms part of a coherent assignment to the various classes of claims which may arise against the Secretary, in his role as the Cabinet official responsible for the administration of the Social Security Act, of a grant of subject matter jurisdiction appropriate to each.

The restrictions imposed by the second sentence of §205(h) are not pertinent to the issues presented by the Secretary's petition, for, unlike those contained in the third sentence, they are not jurisdictional. Rather, as this Court noted in *Weinberger v. Salfi, supra*, they are designed to "assure that administrative exhaustion will be required." 422 U.S. at 757.

The Court's understanding of the second sentence of Section 205(h) as a codification of the doctrine of exhaustion of administrative remedies is the only

sensible one. For if the sentence's language were read literally to preclude review of any "decision of the Secretary . . . except as . . . provided [by Section 205(g)]," the sweeping jurisdictional restrictions of the third sentence would be entirely unnecessary and its enactment, therefore, wholly useless and redundant. If the third sentence is not to be so "relegated . . . to a function already performed by other statutory provisions," *Salfi, supra* at 759, the second sentence must be construed simply to require that those claims which are entitled to administrative review pursuant to Section 205(b) will come to Court, if at all, only after such review has been exhausted, and then pursuant to the grant of jurisdiction provided by Section 205(g).

Respondent Sanders' entitlement to judicial review of his request to reopen under the APA is, on this reasoning, unaffected by the second sentence of Section 205(h). For by postulate, the question whether the APA confers jurisdiction over reopening claims is presented only if such claims are not judicially reviewable under the authority of Section 205(g), because they are not entitled to administrative review pursuant to Section 205(b). And it is plain enough that an applicant for reopening cannot be required to exhaust administrative remedies which may properly be, and in respondent's case indeed have been, foreclosed to him.

The opinion of the United States Court of Appeals for the Second Circuit in *Cappadora v. Celebrezze*, 356 F.2d 1 (2nd Cir. 1966) thus remains sound in its treatment of the second sentence of Section 205(h).[7] In *Cappadora*, Judge Friendly, writing for the Court, found that:

[7] The Secretary's intimation, Govt. Br. at 13-14 n. 2, that the Second Circuit has, in its recent holding in *South Windsor Convalescent Home Inc. v. Mathews*, No. 75-6136 (2nd Cir. July 27, 1976) repudiated its opinion in *Cappadora* is, with respect, mistaken. The *South Windsor* holding,

> "Although it could be argued that the second sentence of §405(h) of the Social Security Act is a statutory preclusion of such review, the more reasonable construction is that this simply forbids attempts to review final decisions on the merits by any route other than that provided in §405(g)." 356 F.2d at 5.

Judge Friendly then went on, as Amicus points out *infra*, to hold that the APA provides a source of jurisdiction "to review refusals to reopen" in order to provide relief from "unreasonable or inappropriate agency rule[s] on reopening, . . . unreasonable deviation[s] from [appropriate] rules," or any other "truly arbitrary decision." *Id.* at 6. Judge Friendly considered the availability of such relief to be essential in order to "maintain . . . the proper bounds of administrative discretion and safeguard . . . the rights of the individual." *Id.* But he also found that the provision of judicial review over reopening cases "would impose a relatively slight burden on the agency and the courts." *Id.*

Experience since *Cappadora* suggests that the burden on the courts has indeed been slight. Even though courts in the vast majority of the ten Circuits have now found jurisdiction to review the Secretary's refusal to reopen, Amicus can discover only 33 cases reported in calendar years 1974 and 1975 from the District and Circuit Courts which dealt with the substantive issues of reopening/res judicata. Amicus Appendix, p. 1a-4a.

following *Weinberger v. Salfi, supra,* relied on the *third* sentence of Section 405(h) to preclude the assertion of jurisdiction under 28 U.S.C. §1331 over a provider's challenge to the statutory and constitutional validity of a Medicare regulation. The Court went on, however, to find that the provider could present its challenge to the United States Court of Claims pursuant to 28 U.S.C. §1491 on the theory that Section 1491 was not included in "Section 41 of Title 28," and thus not subject to the restrictions imposed by that sentence.

These cases reflect only a minuscule portion (less than 1%) of the over four thousand Social Security cases disposed of by the federal courts during this period. See Operational Analysis of the Bureau of Hearings and Appeals (June 30, 1975), p. 30-31. This experience suggests that the Secretary's fear of a decision adverse to him "flooding the courts with great numbers" of cases (Govt. Br. at 9) is both speculative and alarmist.

The record since *Cappadora* also suggests that the decision is not one safely left to agency discretion as advocated by the government (Govt. Br. 10-11, 22). Of the 32 cases with opinions reported in calendar years 1974 and 1975, from those Circuits which have recognized the courts' jurisdiction to review the Secretary's refusal to reopen, the courts have found the Secretary to be erroneous 14 times on the merits of the claim, i.e. in 43% of the reported cases. Amicus Appendix, p. 1a-4a.

Thus the availability of judicial review, under the APA, to correct agency abuses of discretion in reopening cases has proved to be salutary in its effects and extremely limited in its impact on the caseload of the federal courts. Judge Friendly's construction of the second sentence of Section 205(h) in *Cappadora*, ratified by this court in *Salfi, supra,* has been shown to provide sound policy guidance as well as the only coherent account of Congress' purpose in enacting it.

III.

SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT PROVIDES AN INDEPENDENT GRANT OF JURISDICTION FOR REVIEW OF AGENCY ACTION IN APPROPRIATE CASES INCLUDING REFUSAL TO REOPEN AN APPLICATION FOR SOCIAL SECURITY BENEFITS PREVIOUSLY DENIED.

The Secretary has attempted to depict the Seventh Circuit's characterization of Section 10 of the Adminis-

trative Procedure Act, 5 U.S.C. §§701-706, as a mistaken reading of the law. To this end, he contends that the APA cannot act as a grant of jurisdiction, but rather that its provisions only "regulate the particular procedures, forms and standards for judicial review of claims of legal injury . . .," Govt. Br. at 24, and that its structure and legislative history, and the Supreme Court cases interpreting it, all support this observation. The argument is premised on the existence of an observable distinction between "reviewability" and "jurisdiction"; the former apparently is directed towards the types of cases, the kinds of plaintiffs, and the status of the claim for which there should be review, while the latter is concerned with the power of a court to hear a claim. Thus, the Secretary has attempted to discern a clear-cut difference between the propriety of review and the authority to review, with the intent of concluding that Section 10 only encompasses the first.

The Secretary's distinction is, however, based on language which is strongly indicative of a congressional intent and assumption that the APA would provide a court with jurisdiction. The Secretary argues that since this language does not specifically state that the APA confers jurisdiction, that it cannot represent an independent jurisdictional basis. Govt. Br. at 29. Although an explicit grant of jurisdiction would have prevented any need for judicial elaboration of Section 10, a determination that the section does not provide such a grant would violate the entire thrust and tenor of the APA. The non-jurisdictional construction of the language creates an essential contradiction: there would be little purpose in the ten-year effort directed towards the development of the APA if its effectiveness were dependent on factors essentially unrelated to the need and desirability of review. The APA encompassed virtually every facet of administrative review, and it is

incomprehensible that Congress, in constructing this mechanism, would have assumed that only a few, those meeting standards unrelated to the question of review, would have access to the system.

A. *The general legislative history of the APA indicates an assumption that Section 10 would act as an independent grant of jurisdiction.*

As the Secretary has indicated, the APA was the result of extensive study and analysis intended to revamp, modernize, and clarify administrative review. President Roosevelt requested the Attorney General to appoint a committee to investigate the area, and he considered that study significant enough that he vetoed the 1939 Walter-Logan Bill, which also concerned administrative procedure, in anticipation of the Attorney General's report. S. Rep. No. 752, 79th Cong., 1st Sess. (1945), in S. Doc. No. 248, 79th Cong., 2d Sess. 189-190 (1946).[8] That Final Report of the Attorney General's Committee on Administrative Procedure examined in detail the present structure of administrative review in existing federal agencies, indicating, *inter alia,* its belief that "there has been little question as to the propriety of judicial review of administrative adjudication." S. Doc. No. 8, 77th Cong., 1st Sess. 75 (1941). Despite suggesting that judicial review was appropriate "to check extremes of arbitrariness or incompetence in administration adjudications," *id.* at 78, the Committee majority did not include a section on judicial review in its proposed bill. *Id.* at 191-202. But the three-person minority, whose recommendations on judicial review were generally incorporated into the APA, indicated a strong belief in the need for a comprehensive process of

[8] Much of the legislative history relied upon in this Brief was printed in S. Doc. No. 248, and future references, in addition to listing the particular report or proceeding, will cite the appropriate pages in S. Doc. No. 248.

judicial review. *Id.* at 209-12. Rather than permitting the courts to decide whether to review on a case-by-case basis, the minority requested that Congress "provide more definitely by general legislation for both the availability and scope of judicial review, in order to reduce uncertainty and variability." *Id.* at 211. Further, they offered a proposed statute on judicial review which, in many respects, was similar to the ultimate result: Section 10 of the APA. In the proposed subsection (b) [which evolved into subsection 10(a) of the APA, 5 U.S.C. §702] the minority indicated clearly that, except for specific statutory statements to the contrary, "any person adversely affected by any final decision of any agency" would have judicial review in accordance with applicable statutory provisions, "or, in the absence thereof, by application in equity or for writ of mandamus." *Id.* at 246. The Secretary could be expected to read this section as merely indicating that such decisions would be reviewable only if a court could properly exercise subject matter jurisdiction. But the more appropriate reading is that the minority intended this section to provide a grant of jurisdiction for those cases where none then existed.

In the Senate's consideration of S. 7, which became, in slightly different form, the APA, H.R. No. 1980, 79th Cong., 2d Sess. (1946), in S. Doc. No. 248 at 250, the Attorney General committee's minority position on the need for a clear statement of judicial review was solidified. Contrary to the Secretary's argument, the Senate Judiciary Committee viewed the APA as representing a significant change in the law applicable to administrative agencies: "The bill [S. 7] . . . is not a specification of the details of Administrative procedure, nor is it a codification of administrative law. Instead, out of long consideration and in the light of the studies heretofore mentioned, there has been framed an outline

of minimum basic essentials." S.R. No. 752, 79th Cong., 1st Sess. (1945), in S. Doc. No. 248 at 193. The Report's next paragraph describes what those essentials are. The bill was to provide affected parties a way of knowing what their rights were; it was to provide administrators with a comprehensive method of handling appeals of agency decisions; and, most instructively, "[t]he jurisdiction of the courts is clearly stated." *Ibid.*[9] Thus, the Judiciary Committee determined that the bottom line for a legitimate administrative procedure was the guaranteed availability of the courts for review of agency decisions. Without such availability, there would be no check on the agencies, and "statutes would in effect be blank checks drawn to the credit of some administrative officer or board." *Id.*, at 212.

The Senate Judiciary Committee, of course, recommended that the bill be passed. They viewed judicial review as a prerequisite to the effectiveness of the bill as a whole. "It is indispensable since its mere existence precludes the arbitrary exercise of powers or assumption of powers not granted." *Id.*, at 217. And it was clear to the Committee that inherent in the concept of S. 7 was that such review was thereby guaranteed: "[T]he enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis." *Ibid.* This view was echoed on the Senate floor by Senator McCarran, the Chairman of the

[9] In a sentence summarizing these three essential features of the bill, the Judiciary Committee Report states: "The bill thus provides for public information, administrative operation, and judicial review." S.R. No. 752, 79th Cong., 1st Sess. (1945), in S. Doc. No. 248, at 193. Thus, the logical construction of the paragraph and the summarizing sentence is that, in the Committee's view, jurisdiction and review are the same; the Senate Committee assumed that jurisdiction was encompassed in the notion of review.

Judiciary Committee. See Proceedings in the Senate, March 12, 1946 in S. Doc. No. 248 at 326. The Senator also indicated in an exchange with Senator Austin the significance which he attached to the measure and the impact which he expected it to have on the availability of judicial review.

> (Mr. Austin) Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?
>
> (Mr. McCarran) That is correct.
>
> (Mr. Austin) And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward *for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?*
>
> (Mr. McCarran) That is correct. (Emphasis added.) *Id.*, at 311.

One can only surmise that Senators McCarran and Austin considered that the proposed bill would assure access to the judiciary for review of agency action. It is inconceivable that beneath their pointed discussion of the measure's intention to remedy a defect was a belief that the defect could only be remedied if the court had a separate source of jurisdiction. The Secretary would apparently read the exchange as indicating only that Section 10 was to provide a greater range of reviewability, yet a common-sense reading suggests that the issues of reviewability and jurisdiction were considered interchangeable. Senator Austin was obviously concerned about the impact of Section 10, and wished to assure himself and other Senators that, in fact, its purpose was to provide the ultimate review of agency action where necessary. Senator McCarran's response to Senator Austin provided this assurance. The defect in previous administrative law was remedied by a

guarantee that agency action was reviewable, a guarantee which necessarily implied that a court had the jurisdiction to undertake that review.

Discussion of the bill on the House floor yielded a similar understanding of the intended reach of the APA. On the House floor, Representative Walter of the House Judiciary Committee discussed Section 10 in these words:

> Section 10 is a comprehensive statement of the right, mechanics, and scope of judicial review. It requires an effective, just, and complete determination of every case and every relevant issue. It is a means of enforcing all forms of law and all types of legal limitations. Every form of statutory right or limitation would thus be subject to judicial review under the bill. . . .

Proceedings in the House, May 24, 1946, in S. Doc. No. 248 at 368.

In short, a review of the overall thrust of Section 10, by those proposing it and by those considering it, indicates a concern with the practical availability of review. Under that general heading, "review", may be found the Secretary's dual concepts of reviewability and jurisdiction, the latter a necessary predicate to the exercise of the former. As viewed by the proponents of the legislation, and those to whom it was presented, the measure offered no distinction between reviewability and jurisdiction. The assumption, as the legislative history highlights, was that agency action was generally reviewable; no claim was made that it would be reviewable only in those situations where jurisdiction otherwise existed. Consequently, the Secretary's contention that the absence of an explicit statement of jurisdiction must be read to mean that the APA did not provide such a grant is in direct opposition to the comprehension of the responsible legislators. Their

understanding was that a court was positioned to review agency action by the determination that such action was reviewable. Their assumption was that jurisdiction was encompassed in the notion of reviewability.

B. *A close analysis of the applicable subsections of Section 10, and of their legislative history, supports the conclusion that it does represent an independent grant of jurisdiction, which is properly exercised in this case.*

The Secretary has discussed at length several parts of Section 10, concluding that appropriate provisions preclude application of the APA to this case, or, alternatively, that taken individually and as a whole, they demonstrate that Section 10 offers no independent grant of jurisdiction. The introductory paragraph to Section 10, 5 U.S.C. §701, sets out the two basic exceptions to the availability of judicial review of agency action: where other statutes specifically preclude judicial review and where agency action is committed to agency discretion by law. The first exception was an acceptance of the fact that in some statutes Congress had previously excluded the judiciary from reviewing an agency decision. The relevance of this section to the merits of this case have previously been noted in the discussion of Section 205(h) of the Social Security Act, *ante*, at pp. 21-27, and will not be repeated here. But the legislative history of the section provides further indication of congressional thinking with regard to the intended impact of Section 10. For example, Rep. Gwynn, of the House Committee, in discussing the exceptions in 5 U.S.C. §701, indicated a belief that Section 10 was intended to cover most review situations and that jurisdiction was assumed: "This bill does not give a court review in any case where review is now precluded by statute. It simply clarifies *and*

expands in some particulars the authority of the court in reviewing cases in which court review is not precluded by law." (Emphasis added.) *Id.* at 374-75.

The Secretary also suggests that the reopening issue is one that has been reserved to agency discretion, and that therefore Section 10 can have no applicability to the case. Govt. Br. at 26-27. The agrument is premised on the lack of specific entitlement in the Social Security Act to review of a reopening denial. Again, however, the legislative history runs counter to the Secretary's interpretation; the Senate Judiciary Committee Report, for example, notes that "Section 10 on judicial review relates not only to decisions made after agency hearing, but, in appropriate cases, to the exercise of any other administrative power or authority." S.R. 752, 79th Cong., 1st Sess. (1945) in S. Doc. No. 248 at 195. Congress was not suggesting, as the Secretary would have it, that the mere failure to include a specific situation among those which a review statute encompassed indicated that that situation was irretrievably left to agency discretion. Rather, as the Committee Report notes, *id.* at 212, the exception was simply a statement of existing and accepted law.

More relevant to the merits of this case is the intention of the APA's author, Sen. McCarran, that an aggrieved party have the opportunity for judicial review of an alleged abuse of discretion by the agency. On the floor of the Senate, the following exchange highlighted that approach:

> (Mr. Donnell) . . . In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been an abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion

from the right to have judicial review of the action so taken by the agency?

(Mr. McCarran) Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review. . . .

(Mr. Donnell) But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

(Mr. McCarran) It must not be an arbitrary decision. It must be a judicial discretion; it must be a discretion based on sound reasoning.

Proceedings in the Senate, March 12, 1946, in S. Doc. No. 248 at 310-11.

Respondent Sanders has contended that the Secretary's refusal to reopen his claim represents this sort of abuse of discretion. The mere fact that nothing in the Social Security Act explicitly requires reopening is hardly sufficient to put the Secretary's decision beyond the power of the courts to review. The opening paragraph of Section 10 was not directed at such a situation.[10]

The Secretary relies on *Stuckey v. Weinberger*, 488 F.2d 904 (9th Cir. 1973) (*en banc*) and *Ortego v. Weinberger*, 516 F.2d 1005 (5th Cir. 1975), to suggest that decisions made after a hearing are irrevocably committed to agency discretion. Govt. Br. at 26-27. *Stuckey* is, in fact, the only reopening case which held

[10] The exception applies only to matters that are "by law committed to the absolute discretion of administrative agencies . . . [The agencies] do not have any authority in any case to act blindly or arbitrarily. They may not wilfully act or refuse to act." Rep. Walters, Proceedings in the House, March 12, 1946, in S. Doc. No. 248 at 368.

that such decisions are left purely to the discretion of the agency. *Ortego* only mentions the *Stuckey* holding, 516 F.2d at 1011, and sides "with the majority of courts that have allowed review of refusals to reopen prior social security applications pursuant to Section 10 of the APA." *Id.* at 1015. In fact, most reopening cases simply ignore the possibility that the decision whether to reopen is irrevocably committed to agency discretion; they assume the opposite, and focus their attention primarily on whether the decision was an abuse of discretion pursuant to Section 10(e) of the APA, 5 U.S.C. §706(2)(A).[11]

Without belaboring the issue, it is worth noting that the case on which most later decisions based their holdings with respect to the availability of APA jurisdiction presents a succinct analysis of the question of whether a refusal to reopen is solely within agency discretion. In *Cappadora v. Celebrezze, supra,* 356 F.2d at 6, Judge Friendly writes:

> [T]he discretion conferred in day-to-day administration cannot have been assumed to extend to unreasonable deviation from such rules on an *ad hoc* basis at the whim of the Administration. In this context, we do not believe that Congress would have wished to close the doors of the court to a plaintiff whose claims for social security benefits was denied because of a truly arbitrary administrative decision. . . . Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of a defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.

[11] *See, e.g., Lejeune v. Mathews*, 526 F.2d 950 (5th Cir. 1976); *Hunt v. Weinberger*, 527 F.2d 544 (6th Cir. 1975); *Ruiz-Olan v. Secretary of Health, Education & Welfare*, 511 F.2d 1056 (1st Cir. 1975); *Maddox v. Richardson*, 464 F.2d 617 (6th Cir. 1972); *Davis v. Richardson*, 460 F.2d 772 (3d Cir. 1972).

The Secretary also devotes substantial attention to the provision of Section 10 entitled "Right of review," 5 U.S.C. §702. In discussing this language, the Secretary places particular emphasis on the question of reviewability. Despite the apparent meaning of the language, that there will be review of an alleged wrong, the Secretary argues that the section is addressed only to the question of "which categories of persons are entitled to judicial review . . ." Govt. Br. at 27. There is little in the legislative history which provides assistance in understanding this section beyond the words themselves. *Amicus* contends that those words speak for themselves, and that the refusal to reopen is one of the situations contemplated by Congress in its comprehension of the section. Rep. Walter declared: "Legal wrong means action or inaction in violation of the law or the facts." Proceedings in the House, May 24, 1946, in S. Doc. No. 248 at 369. It is unlikely that Congress intended that only some, but not all, legal wrongs would be susceptible of judicial correction.

It is with respect to subsection 10(b), 5 U.S.C. §703, that the Secretary offers his most startling argument. The title of that section is "Form and venue of proceeding." Once again, part of the thrust of this section is to ensure that the APA will not be interpreted to affect specific statutory directives which are also applicable. Consequently, the first clause of the first sentence is not, as the Secretary argues, Govt. Br. at 28-29, a declaration of the need for a separate source of jurisdiction, but rather, a statement that where an explicit command exists as to the "specified" court appropriate for review of a particular matter, that statute should be followed. Thus, just as the opening clause of the introduction, 5 U.S.C. §701(a)(1), ensures that the APA will not supersede any statutes forbidding judicial review in specified situations, so does this

clause ensure that the APA will not supersede a statute specifying the appropriate form of review and court in which such review shall be had. This section was never intended to suggest implicitly that appropriate relief was dependent on the availability of an outside source of jurisdiction; rather, its purpose was to indicate that relief must be sought in an appropriate court if an applicable statute already existed.

The legislative history bears out this analysis. The minority position in the Attorney General's Report titled the section "Courts and venue," and directed that when a court is

> without jurisdiction to hear and determine a timely application or petition for such review on the ground that the same should have been filed before some other court, it shall transmit such pleadings and other papers, together with a statement of its reasons for so doing, to such court of competent jurisdiction as may be designated by the applicant or petitioner, which court shall, after permitting any necessary amendments, thereupon proceed as in other cases.

Deficiencies in form or type of remedy were to be resolved by amendment. Final Report of the Attorney General's Committee, *supra*, at 246. The provision, then, was solely intended to ensure that technical failures in seeking review, such as applying to the Court of Claims or to a Circuit Court instead of to a District Court, would not invalidate the appeal. Contrary to the Secretary's view, the implicit assumption of the section is that a court *does* exist with jurisdiction to review the agency decision; the concern is only that where an appropriate specific review statute exists, it should be followed.

The remainder of the first sentence, and the second sentence, are similarly devoted to the kind of review

available. The Senate Judiciary Committee's Report, in which the wording of the "Form and venue of action" section is almost identical to the present subsection 10(b) of the APA, notes that the "first sentence . . . is an express statutory recognition of the so-called common-law actions as being appropriate and authorized means of judicial review, operative *whenever special forms of judicial review are lacking or insufficient.*" (Emphasis added.) S.R. 752, 79th Cong., 1st Sess. (1945), in S. Doc. No. 248 at 212. The purpose, of course, is to ensure that *some* kind of review will be available in all cases, but the form of that review will be dependent on whether a special type of proceeding has been previously described.

The second sentence of the section is a further effort to ensure that the appropriate court and method of proceeding will be utilized: "The exception for 'prior, adequate, and exclusive . . . review' in the second sentence is operative only where statutes, either expressly or as they are interpreted, require parties to resort to some special statutory form of judicial review which is prior in time and adequate to the case." *Id.* at 213. Rep. Walter best summarized the purpose and meaning of subsection 10(b): "The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress has made no contrary provision for judicial review." Proceedings in the House, May 24, 1946, in S. Doc. No. 248, at 369.

Thus, contrary to the Secretary's suggestion that the purpose of Section 703 was "to leave court jurisdiction in this area unchanged," Govt. Br. at 29, its actual intent was to ensure that the appropriate review

mechanism would be followed in the appropriate court. The assumption under which the section was proposed is that there will be review in all cases, and that consequently there is jurisdiction. Section 703 is devoted exclusively to determining how that review will be effected. To draw conclusions regarding jurisdictional thrusts is to ignore the language and history.

Amicus agrees with the Secretary's suggestion that Section 704 is not a grant of jurisdiction. Govt. Br. at 31. At the same time, the purposes of the section are worth noting. Among these purposes was a design to assure that agency action was reviewable regardless of the lack of a specific statutory requirement. In this respect, that first sentence is further indication that Congress intended to protect individuals from *all* agency action unless specifically excluded. It is once again inconceivable that Congress would have manifested such an intent, spelling out that both actions specifically reviewable by statute and others not explicitly enumerated, were reviewable, while assuming at the same time that the power to make such review required a separate source.

C. *Case law supports the APA as an independent grant of jurisdiction.*

While generally favoring review without regard to the amount in controversy, the commentators are divided as to whether the APA properly provides the jurisdictional basis for such review.[12] The Courts of Appeals,

[12] Compare Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 Harv. L. Rev. 308 (1967), Davis, *Administrative Law Treatise* §23.02 (Supp. 1970), Jaffe, *Judicial Control of Administrative Action* 165 (1965), with Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defend-*

however, heavily support the position taken by the Seventh Circuit.[13] And this Court, though not absolutely clear in its pronouncements, appears to have accepted that Section 10 confers jurisdiction. The Secretary argues, however, in line with his general approach, that these cases, *Rusk v. Cort,* 369 U.S. 367, *Abbott Laboratories v. Gardner,* 387 U.S. 136, and *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401

ant, 68 Mich. L. Rev. 389, 445 (1970), Wright, Miller & Cooper, *Federal Practice and Procedure,* §3568 (1975), and Comment, *The Jurisdictional Basis of Nonstatutory Judicial Review in Suits Against Federal Officers-Jurisdictional Amount, the Administrative Procedure Act and Mandamus,* 51 Wash. L. Rev. 97, 114-115 (1975).

[13] Six circuits have accepted the APA as an independent grant of jurisdiction. See *Lejeune v. Mathews,* 526 F.2d 950, 952-953 (5th Cir. 1976); *Hunt v. Weinberger,* 527 F.2d 544, 546-547 (6th Cir. 1975); *Elton Orchards, Inc. v. Brennan,* 508 F.2d 493, 497 (1st Cir. 1974); *Bard v. Seamans,* 507 F.2d 765, 767-768, (10th Cir. 1974); *Pickus v. United States Board of Parole,* 507, F.2d 1107, 1109-1110 (D.C. Cir. 1974); *McEachern v. United States,* 321 F.2d 31, 33 (4th Cir. 1963). Only two have clearly stated that the APA does not provide jurisdiction. See *Grant v. Hogan,* 505 F.2d 1220, 1225 (3rd Cir. 1974); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529, 532 (8th Cir. 1967). Two circuits have indicated uncertainty in the area. Although the Second found APA jurisdiction in *Cappadora v. Celebrezze,* 356 F.2d 1, 5-6 (2d Cir. 1966), it later required that a jurisdictional amount be met in *Wolff v. Selective Service Board,* 372 F.2d 817, 826 (2d Cir. 1967). And, in more recent cases, it has indicated that the issue is unsettled. *South Windsor Convalescent Home, Inc. v. Mathews,* CCH Medicare and Medicaid Guide, ¶27, 918 (2d Cir., July 27, 1976); *Aguayo v. Richardson,* 473 F.2d 1090, 1101-1102 (2d Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974); *Mills v. Richardson,* 464 F.2d 995, 1001 n.9 (2d Cir. 1972). The Ninth Circuit has offered several conflicting opinions on the issue within the last two years. Compare *Rothman v. Hospital Service of Southern California,* 510 F.2d 956, 958 (9th Cir. 1975) and *Proietti v. Levi,* 530 F.2d 836, 838 n.2 (9th Cir. 1976) (both finding APA jurisdiction) with *Nguyen da Yen v. Kissinger,* 528 F.2d 1194, 1201 and n.11, 12 (9th Cir. 1975) (finding no APA jurisdiction.)

U.S. 402, do not reach the jurisdictional issue, but rather resolve only the question of reviewability. *Amicus* submits that the Secretary's reasoning can draw no support from the actual holdings of these cases.

It is clear, as the Secretary acknowledges, Govt. Br. at 36, that the only question decided in *Cort* was whether the district court had jurisdiction to review an administrative decision that the plaintiff had lost his citizenship. 369 U.S. at 370. The Secretary argues, however, that the case was not actually concerned with jurisdiction, as that problem was effectively resolved by the nature of the right at stake. On the theory that citizenship satisfied the amount-in-controversy requirement of 28 U.S.C. §1331, the Secretary argues that that section must have been the basis for jurisdiction, thus rendering the discussion of the APA merely one concerning reviewability. Govt. Br. at 36. This gratuitious interpretation is contradicted by the Court's own comprehension of the issue.

Mr. Justice Stewart, speaking for the Court, wrote as follows:

> "On their face [the Declaratory Judgment Act and Sections 10 and 12 of the APA] appear clearly to permit an action such as was brought here to review the final determination of the Secretary of State." 369 U.S. at 372.

The Secretary's account also flies directly to the face of the history of the case. The decision of the three-judge court which initially ruled that there was jurisdiction for review noted explicitly that "authority to hear and determine [the case] was conferred upon the District Court by the Declaratory Judgments Act and the Administrative Procedure Act." [Footnote and citations omitted.] *Cort v. Herter,* 187 F. Supp. 683, 685

(D. Mass. 1960). Since the Declaratory Judgment Act is not a grant of jurisdiction, but only a procedural mechanism,[14] it necessarily follows that at all times, the APA was the only considered basis for jurisdiction.[15]

Justice Harlan in *Abbott Laboratories* carefully reviewed the applicable provisions of the APA. He summarized by observing that

> [t]he legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions [footnote omitted], and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. *Shaugnessy v. Pedreiero*, 349 U.S. 48, 51 [other citations omitted]
> . . . .

387 U.S. at 140-41. Further, he noted that *Cort* had reemphasized the requirement that judicial review be available except upon a showing of clear and convincing congressional intent. *Id.* at 141. The issue in *Abbott Laboratories* was whether specific procedures for review of certain regulations necessarily precluded pre-enforcement review of regulations via the Declaratory Judgment Act and the APA. And, again, it was concluded that such review had not been precluded by the specific review statutes. In reaching that conclusion, the Court necessarily had to rely on the APA as the basis for jurisdiction, as this passage indicates:

> That the Court refused to permit such an action [for review in *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594] is hardly authority for cutting off the well-established jurisdiction of the federal courts to hear, in appropriate cases, suits under the Declaratory Judgment Act and the Administrative Procedure Act challenging final agency action of the kind present here.

Id., at 148.

With the Court's attention focused primarily on the availability of declaratory relief for pre-enforcement review, see *id.* at 154-55, relatively little effort was directed explicitly towards the jurisdictional question. The Secretary though, by ignoring the implicit acceptance of jurisdiction in the decision on reviewability, reaches a totally unwarranted conclusion that "in view of the nature of the case, which involved commercial interests that could be assumed to have a value substantially in excess of the amount-in-controversy requirement of 28 U.S.C. 1331," the Court specifically

[14] *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667.

[15] The Secretary places substantial reliance, Govt. Br. at 36-37, on a statement in *Cort* to the effect that the Supreme Court had employed the Declaratory Judgment Act as a method for review of decisions of the Secretary of State, 369 U.S., at 372, both before and after the enactment of the APA. According to the Secretary, the import of this comment is that "the Court was invoking the pre-existing common law doctrine of the reviewability of administrative actions . . ." Govt. Br. at 37. In the context of the decision, however, it is clear that the Court's reference was specifically to the issue of whether a declaratory judgment was an appropriate "remedy to secure a determination of citizenship . . ." 369 U.S. at 372. The Court was only emphasizing that such a remedy had been available for some time, and that the APA had not altered that availability. This discussion was part of a larger argument as to whether the plaintiff was limited to the review procedures outlined in subsections (b) and (c) of §360 of the Immigration and Nationality Act of 1952. The Court noted that Section 12 of the APA forbade subsequent legislation from superseding or modifying the APA, except where expressly stated, and was therefore able to conclude that subsections (b) and (c) of §360 did not describe the sole available remedy. Consequently, the Court's discussion of the use of declaratory judgments both before and after the enactment of the APA was intended to indicate that that was a longstanding remedy, available where any legitimate grant of jurisdiction existed (including the APA), and that Section 12 of the APA rendered untenable the Secretary's position that the procedures of §360 took precedence.

avoided a jurisdictional discussion. Govt. Br. at 38. The Court's assumption, to the contrary, was that the APA encompassed both concepts of reviewability and jurisdiction. Section 1331 is nowhere mentioned; it is not needed.

The final leg in this trilogy, *Overton Park*, provokes a similar dismissal from the Secretary on the grounds that Section 1331 must have provided the jurisdictional basis. Again, such an analysis runs contrary to the explicit and implicit determinations of the reviewing courts. The district court specifically assumed jurisdiction under Section 10 of the APA. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 309 F. Supp. 1189, 1193 (W.D. Tenn. 1970). The appellate court never considered jurisdiction, apparently assuming that that was not in issue.[16] And the Supreme Court, through Justice Marshall, indicated its belief that the APA was the appropriate vehicle for testing the action of the Department of Transportation. 401 U.S. at 410-13.[17] Again, the Secretary suggests that the APA discussion

[16] Judge Celebrezze suggested in dissent, however, that the cause be remanded for the district court to reconsider under the mandamus jurisdiction of 28 U.S.C. §1361. 432 F.2d, at 1318.

[17] A reference to *Overton Park* by the Fifth Circuit in *Ortego v. Weinberger, supra*, at 1013, is strongly supportive of a Supreme Court comprehension of the APA as a jurisdictional statute. The panel writes: "[A]lthough the Court [in *Overton Park*] might have availed itself of 28 U.S.C. §1337 (acts regulating commerce) as the jurisdictional cornerstone, it did not. Instead, it relied exclusively on Section 10 of the APA, thereby indicating that the Act serves both jurisdictional and remedial functions." (Footnote omitted.) This point is, of course, also applicable to this Court's failure to employ Section 1331: although either section might conceivably have been stretched to represent the jurisdictional basis, the refusal to do so is an implicit recognition, as the Fifth Circuit suggests, that the effort was intended to emphasize the jurisdictional use of the APA in administrative review cases.

was relative only to the question of reviewability; and, again, that analysis is rebutted by this Court's own finding that jurisdiction and review are encompassed in the same concept. That finding, rather than the Secretary's contention that Section 1331 jurisdiction lies behind these cases, is the logical comprehension of the three. The decisions represent more than a mere "presumption favoring judicial review" (Govt. Br. at 39); they are a statement on the availability of the APA as a source of jurisdiction for review of agency decisions in cases not otherwise excluded.

By his *ex post facto* reliance on Section 1331 as the assumed source of jurisdiction in these cases, the Secretary has accentuated the basic problem with reliance on that section in cases involving acts of administrative agencies. The inquiry it sets up is generally irrelevant.[18] There is no legitimate rationale for requiring that judicial review of administrative action have a $10,000 figure attached to it. See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216, 220 (1948).[19] Congress recognized this, and freed plaintiffs

[18] "It does seem inapt to make it a condition of a suit against an officer that the right asserted be given a value, if indeed in many cases it is even possible." Jaffe, *Judicial Control of Administrative Action*, 165 (1965).

[19] See also *Recommendations and Reports of the Administrative Conference of the United States*, 169-180 (1970). Recommendation No. 7 urges the elimination of "any requirement of a minimum jurisdictional amount before U.S. district courts may exercise original jurisdiction over any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer of the United States or any agency thereof, acting under color of Federal law." *Id.*, at 196. The report on this recommendation, by Prof. Cramton, briefly analyzes Section 10, noting that a finding of a jurisdictional grant in the APA "would go far to ameloriate the problems with which this recommendation is concerned." *Id.*, at 179.

from resort to such manipulation of the amount in controversy as the Secretary has attempted. It must be concluded that Section 1331 was not contemplated as a source of review for administrative actions, and that the APA was viewed as providing the appropriate jurisdictional mechanism.

In the end, of course, the Secretary is correct to the extent that he claims that the APA does not explicitly present an independent grant of jurisdiction. But its language and history heavily suggest that that has been the implicit assumption of its creators and its interpreters. Perhaps even more persuasive, however, is the common-sense approach to the APA. In his discussion of *Rusk v. Cort*, Prof. Davis concludes that Section 10 was the basis for jurisdiction, even though this Court's analysis was primarily focused on the Immigration Act. In response to the question as to why such a seemingly important issue was resolved in such an offhand manner, he asks this rhetorical question: "But should the Court be expected to write a legal analysis to show that a person who is 'entitled' to review should not be denied review?" Davis, *Administrative Law Treatise* §23.02 at 790 (Supp. 1970). In short, if the APA does not provide an independent grant of jurisdiction for review of agency decisions, the ten years of study, analysis and drafting which preceded it yielded far less than its framers intended.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

I. Reported cases[1] with opinions in which the court found jurisdiction to review the Secretary's refusal to reopen[2]:

A. Cases upholding the Secretary's refusal to reopen (i.e., no abuse of discretion found):

1974 (Calendar Year)

Green v. Weinberger, 500 F.2d 203 (5th Cir. 1974).

Stonestreet v. Secretary of H.E.W., 494 F.2d 342 (4th Cir. 1974)[3].

Borg v. Weinberger, 381 F. Supp. 1212 (E.D. Mich. 1974).

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[1] The term "reported cases" refers to all cases reported in the West Reporter system (Federal Supplement and Federal Second) as well as any cases reported in the Commerce Clearing House, Unemployment Insurance Reporter, a service which reports many decisions which are not published in the West system.

[2] In two additional cases, the plaintiff/claimant challenged the Secretary's decision to reopen an earlier favorable determination. In both cases, the court upheld the Secretary's decision to reopen. *Briggs v. Weinberger*, CCH Unempl. Ins. Rep. [January, 1975-January 1976 Transfer Binder] ¶14,317 (D. Md. 1975); *Strickland v. Weinberger*, CCH Unempl. Ins. Rep. [February, 1974-December, 1974 Transfer Binder] ¶17,829 (M.D. Ala. 1974). The list does not include the case presently before this Court, since this case involved a remand to the District Court to decide whether the Secretary did in fact abuse his discretion in failing to reopen. *Sanders v. Weinberger*, 522 F.2d 1167 (7th Cir. 1975).

[3] In *Stonestreet*, while the Hearing Examiner did not find res judicata applicable because of his interpretation of the 1965 amendments to the Social Security Act and denied the claim on the merits, the court held that res judicata should have barred the claim and that implicit in the Hearing Examiner's decision was the finding that, but for his interpretation of the '65 amendments, he would have otherwise found no basis for reopening the claim.

Dyson v. Weinberger, CCH Unempl. Ins. Rep. [February, 1974-December, 1974 Transfer Binder] ¶17,895 (S.D. Ohio 1974).

Webber v. Weinberger, CCH Unempl. Ins. Rep. [January, 1975-January, 1976 Transfer Binder] ¶14,078 (W.D. Mich. 1974).

Woods v. Weinberger, 391 F. Supp. 318 (E.D. Tenn. 1974).

1975 (Calendar Year)

Hunt v. Weinberger, 527 F.2d 544 (6th Cir. 1975).

Johnson v. Weinberger, 525 F.2d 403 (7th Cir. 1975).

Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975).

Ruiz-Olan v. Secretary of H.E.W., 511 F.2d 1056 (1st Cir. 1975).

Shell v. Weinberger, 402 F. Supp. 1201 (E.D. Tenn. 1974). *Aff'd.* 521 F.2d 1401 (6th Cir. 1975).

Hines v. Weinberger, 395 F. Supp. 1215 (D. Wyom. 1975).

Jamison v. Secretary of H.E.W., 394 F. Supp. 296 (E.D. Mich. 1975).

Wright v. Weinberger, 391 F. Supp. 390 (D. Md. 1975).

B. Cases reversing the Secretary's refusal to reopen (i.e., abuse of discretion found):

1974 (Calendar Year)

Anderson v. Weinberger, 380 F. Supp. 640 (D. Md. 1974).

Chenoweth v. Weinberger, 376 F. Supp. 1338 (W.D. Mo. 1974)[4].

[4] One of the three cases in which, while the Court did not explicitly find an abuse of discretion, there was a remand to the Secretary to make specific findings which the Secretary had failed to make on the reopening/res judicata question.

Sullivan v. Secretary of H.E.W., CCH Unempl. Ins. Rep. [February, 1974-December, 1974 Transfer Binder] ¶17,837 (W.D. Ky. 1974).

Negron v. Secretary of H.E.W., 382 F. Supp. 913 (D. P.R. 1974)[4].

1975 (Calendar Year)

Brinker v. Weinberger, 522 F.2d 13 (8th Cir. 1975).

Coulter v. Weinberger, 527 F.2d 224 (3rd Cir. 1975).

Griffin v. Weinberger, 511 F.2d 1403 (6th Cir. 1975) (decision reported at CCH Unempl. Ins. Rep. [January, 1975-January 1976 Transfer Binder] ¶14,115).

Lauritzen v. Weinberger, 514 F.2d 561 (8th Cir. 1975).

Burns v. Weinberger, 394 F. Supp. 1179 (W.D. Mo. 1975).

Dunson v. Weinberger, CCH Unempl. Ins. Rep. [January, 1975-January, 1976 Transfer Binder] ¶14,135 (E.D. Mich. 1975).

Lake v. Weinberger, CCH Unempl. Ins. Rep. [January, 1975-January, 1976 Transfer Binder] ¶14,368 (D.S.C. 1975).

Magel v. Weinberger, 1A CCH Unempl. Ins. Rep. ¶14,550 (W.D. Ky. 1975).

II. Reported cases[1] with opinions in which the court does not explicitly discuss the issue of reopening but in which the court reviews the Secretary's dismissal of a claim on the basis of administrative res judicata:

A. Cases upholding the Secretary's dismissal:

Absher v. Secretary of H.E.W., 371 F. Supp. 873 (M.D. N.C. 1974).

Carter v. Weinberger, 512 F.2d 520 (4th Cir. 1975).

B. Cases reversing the Secretary's dismissal:

Crouch v. Secretary of H.E.W., 378 F. Supp. 1384 (S.D. N.Y. 1974)[5].

Courll v. Weinberger, 393 F. Supp. 1033 (E.D. Cal. 1975)[4].

Total reported court cases in 1974 - 1975 upholding the Secretary's decision: 16.

Total reported court cases in 1974 - 1975 reversing the Secretary's decision: 14.

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[5] In *Crouch*, the issue of res judicata was apparently raised by the Secretary for the first time during judicial review. The Secretary had not dismissed the claim during the administrative process but rather made a final decision on the merits.